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Supreme Court of the United States

OCTOBER TERM, 1954

No. 30

THE NATIONAL CITY BANK OF NEW YORK,
PETITIONER,

vs.

THE REPUBLIC OF CHINA, THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, AS DIRECTOR OF THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1954
CERTIORARI GRANTED APRIL 26, 1954

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE REPUBLIC OF CHINA, SHANGHAI-NANKING RAILWAY ADMINISTRATION, Moh Han, as Director of the Shanghai-Nanking Railway Administration, Sau Chen, as Deputy Director of the Shanghai-Nanking Railway Administration, Plaintiffs,

against

THE NATIONAL CITY BANK OF NEW YORK, Defendant

DOCKET ENTRIES

1951

May 2—Filed complaint and issued summons.

May 9—Filed summons and return, served G. Gless, Asst. Cashier 5/3/51.

May 22—Filed notice of appearance for The National City Bank of New York.

1952

Mar. 14—Filed stipulation and order as to service of answer, note of issue, and extension of time for motion and amended answer—Kaufman, J.

Mar. 14—Filed answer.

Mar. 19—Filed note of issue. Non-Jury Calendar Number 1753 assigned, 3/24/52.

[fol. 2]

July 11—Filed amended answer.

July 14—Filed stipulation extending time to move or reply, to 8/11/52.

Aug. 11—Filed stipulation extending time to move or reply, 9/15/52.

Sept. 15—Filed motion to dismiss counterclaims against The Republic of China.

Oct. 16—Filed stipulation adjourning return day on above motion to 10/30/52.

Nov. 3—Filed stipulation adjourning return day on above motion to 11/13/52.

1953

Jan. 9—Filed order and judgment dismissing counterclaims—Kaufman, J.

Jan. 22—Filed notice of motion for reargument and for leave to amend counterclaims, etc.

Feb. 4—Filed notice of appeal.

Feb. 14—Filed affidavit of Louis J. Gusmano in opposition to motion.

Feb. 27—Filed order dismissing motions—Kaufman, J.

Mar. 3—Filed stipulation extending time to serve and file designation of contents of record on appeal to 3/4/53 and designation of additional portions thereof to 3/16/53.

Mar. 4—Filed designation as to contents of record.

Mar. 6—Filed notice of appeal from order entered on 2/27/53.

Mar. 11—Filed designation as to contents of record.

[fol. 3] SUMMONS—May 2, 1951

Summons (omitted in printing)

[fol. 4] IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed May 2, 1951

Plaintiffs, complaining of defendant by their attorneys, Kirlin, Campbell & Keating, allege:

First: Plaintiff, The Republic of China, at all times mentioned herein was, and now is, a sovereign.

Second: The National Government of plaintiff, The Republic of China, now located at Taipeh, Taiwan (Formosa), was at all times mentioned herein, and is now, the proper and lawful government of The Republic of China, and maintains this suit for the said Republic and for plaintiff, Shanghai-Nanking Railway Administration.

Third: At all times mentioned herein the Department of State of the United States recognized, and now recognizes, the National Government of plaintiff, The Republic of China, as the proper and lawful government of The Republic of China.

Fourth: At all times mentioned herein, plaintiff, Shanghai-Nanking Railway Administration, was, and now is, an agency of the Ministry of Communications of the plaintiff, The Republic of China.

Fifth: At all times mentioned herein plaintiff, Moh Han, was and now is the Director of the Shanghai-Nanking Railway Administration, and a citizen of the plaintiff, The Republic of China.

Sixth: At all times mentioned herein, plaintiff, San Chen, was and now is the Deputy Director of the Shanghai-Nanking Railway Administration, and a citizen of the plaintiff, The Republic of China.

[fol. 5] Seventh: At all times mentioned herein, defendant was and now is a banking corporation organized and existing under the laws of the United States, having a New York branch at No. 55 Wall Street, Borough of Manhattan, in the City, County and State of New York.

Eighth: The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

Ninth: This action arises under Section 632 of Title 12, U. S. C., as hereinafter more fully appears.

Tenth: At all times mentioned herein there existed, and now exists, a Statute known as Section 25(b)4 of the Federal Reserve Act, 12 U. S. C. A. Section 632, which provides, in part:

> "Whenever (1) any insured bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary

of State to such insured bank, the payment, transfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be con-
[fol. 6] clusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property."

Eleventh: In April 1949, and prior thereto, the plaintiffs had, and now have, on deposit with defendant, the sum of Two Hundred Thousand ($200,000.00) Dollars, lawful money of the United States of America, in the name of plaintiff, Shanghai-Nanking Railway Administration, which said sum defendant agreed to repay to plaintiff, Shanghai-Nanking Railway Administration, on demand.

Twelfth: In April 1949, plaintiff, The Republic of China, and plaintiff, Shanghai-Nanking Railway Administration, duly demanded from defendant the repayment of the balance held by defendant for the account of plaintiff, Shanghai-Nanking Railway Administration but the defendant refused, and still refuses, to repay said sums, or any part thereof.

Thirteenth: At all times mentioned herein the Department of State recognized, and now recognizes, that Dr. V. K. Wellington Koo is Ambassador Extraordinary and Plenipotentiary of the Republic of China to the Government of the United States, and that he is the accredited representative of the Republic of China to the Government of the United States, and that he is the only person authorized to speak in the United States for the Chinese Government.

Fourteenth: On or about June 22, 1950, Dr. V. K. Wellington Koo, the Chinese Ambassador to the United States, certified to the Secretary of State of the United States of America the names of plaintiff, Moh Han, and plaintiff, Sau Chen, as having authority to receive, control and dispose of the $200,000 held by defendant for the account of the plaintiff, Shanghai-Nanking Railway Administration.

[fol. 7] Fifteenth: On or about August 21, 1950, the authority of plaintiff, Moh Han, and plaintiff, Sau Chen, to act with respect to the $200,000 held by defendant for the account of the plaintiff, Shanghai-Nanking Railway Administration was accepted and recognized by the Secretary of State of the United States of America.

Sixteenth: On or about August 21, 1950, the Secretary of State of the United States of America certified to defendant the authority of plaintiff, Moh Han, and plaintiff, Sau Chen, to act with respect to the $200,000 held by defendant for the account of plaintiff, Shanghai-Nanking Railway Administration.

Seventeenth: A copy of the certificate referred to in Paragraph Sixteenth of this complaint, certified to be true, is hereto attached, as Exhibit 1.

Eighteenth: On or about October 17, 1950, after the receipt by defendant of said certification by the Secretary of State, plaintiffs demanded from defendant the repayment of the balance held by defendant for the account of plaintiff, Shanghai-Nanking Railway Administration, but the defendant again refused and still refuses to repay said sums, o- any part thereof.

Wherefore, plaintiffs demand judgment against defendant in the sum of Two Hundred Thousand ($200,000.00) Dollars, interest and costs; together with such other and further relief as is just.

Kirlin, Campbell & Keating, by Cletus Keating, a Member of the Firm (Attorneys for Plaintiffs, Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, N. Y.

[fol. 8] EXHIBIT 1 TO COMPLAINT

This is a true copy of the signed original.

(Signed) Stanley D. Metzger, Dept. of State.

August 21, 1950.

Certification Pursuant to Section 25(b) of the Federal Reserve Act, as Amended

DEAR SIRS:

This certification relates to and includes all of the following described property:

(a) $200,000.00 which have been received by the National City Bank of New York from or for the ac-

count of the Shanghai-Nanking Railway Administration and deposited with and held by the National City Bank of New York in the name of the Shanghai-Nanking Railway Administration to the credit of the dollar account designated "The Shanghai-Nanking Railway Administration," being the balance in such account as of the close of business on April 14, 1950, together with any additional amounts which are thereafter so received and deposited with and held by the National City Bank of New York in the name of the above designated dollar account.

I hereby certify to the National City Bank of New York pursuant to the provisions of Section 25(b) of the Federal Reserve Act, as amended, as follows:

(1) That I have received a notification from the Assistant Secretary of the Treasury, dated July 20, 1950, complying with Section 25(b) of the Federal Reserve Act, as amended, of the issuance of the licenses therein described relating to the above described property;

(2) That China is a foreign state recognized by the Government of the United States;

[fol. 9] (3) That Dr. V. K. Wellington Koo is Ambassador Extraordinary and Plenipotentiary of the Republic of China to the Government of the United States and is recognized by me as being the accredited representative of the Republic of China to the Government of the United States;

(4) That said Dr. V. K. Wellington Koo has certified to me under date of June 22, 1950, in accordance with the provisions of Section 25(b) of the Federal Reserve Act, as amended, that the Shanghai-Nanking Railway Administration was on April 14, 1950, and has been at all times since that date, and is now, an agency of the Ministry of Communications of the Republic of China; that annexed to the said certificate of Dr. V. K. Wellington Koo dated June 22, 1950 and made a part thereof is a letter from the Director of the Shanghai-Nanking Railway Administration dated April 14, 1950 to the National City Bank of New York; a certifi-

cate dated April 14, 1950, issued by the Minister of Communications duly certified by the Secretary General of the Executive Yuan, the Minister of Foreign Affairs and Mr. Charles H. Fletcher, Vice Consul of the United States at Taipeh, Taiwan, China; the regulations governing the organization of the Shanghai-Nanking Railway Administration of the Ministry of Communications, promulgated on March 21, 1946; and a photostatic copy of the ministerial orders of appointment for the Director and Deputy Director of the Shanghai-Nanking Railway Administration; and that the persons designated in the signature list, referred to in and attached to the letter dated April 14, 1950 from the Director of the Shanghai-Nanking Railway Administration to the National City Bank of New York had on April 14, 1950 and have had at all times since [fol. 10] that date, and now have, full power and authority, subject to the conditions and limitations indicated in such signature list, to receive, control and dispose of any and all property described above.

(5) That I accept and recognize that the Shanghai-Nanking Railway Administration was on April 14, 1950, and has been at all times since that date, and is now, an agency of the Ministry of Communications of the Republic of China; and that the persons designated in the signature list, referred to in and attached to the letter dated April 14, 1950 from the Director of the Shanghai-Nanking Railway Administration to the National City Bank of New York, which signature list and letter dated April 14, 1950 are annexed to the said certificate of Dr. V. K. Wellington Koo dated June 22, 1950 and made a part thereof, had on April 14, 1950, and have had at all times since that date and now have full power and authority, subject to the conditions and limitations indicated in such signature list, to receive, control and dispose of any and all property described above.

Enclosed herewith and made a part hereof are authenticated copies of the above mentioned notification referred

to in item (1) above, and the certification referred to in item (4) above, with the enclosures thereto.

Very truly yours, (S.) Dean Acheson, Secretary of State.

Enclosures: As described above.

National City Bank of New York, 55 Wall Street, New York, New York.

[fol. 11] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed July 11, 1952

The defendant answers the Complaint herein, as follows:

I. It has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs First, Second, Fifth, Sixth and Ninth thereof.

II. It has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs Third, Fourth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth thereof, except that on August 23, 1950 it received by mail certain documents from the Department of State, copy of one of which designated "Certification Pursuant to Section 25(b) of the Federal Reserve Act, as amended" is attached to the Complaint herein as Exhibit 1.

III. It denies each and every allegation contained in Paragraph Seventh thereof, except that at all times mentioned in the Complaint it was and now is a banking corporation organized and existing under the laws of the United States with its principal place of business at No. 55 Wall Street, Borough of Manhattan, City, County and State of New York.

IV. It admits each and every allegation contained in Paragraphs Eighth and Tenth thereof.

V. It denies each and every allegation contained in Paragraph Eleventh thereof, except that in April 1949 and prior thereto it maintained on its books a deposit account [fol. 12] in the name of "Shanghai Nanking Railway Administration" which was in credit during that month in

the sum of two hundred thousand dollars ($200,000.00), lawful money of the United States of America, and except that the said account is now in credit in the sum of one hundred ninety-nine thousand, nine hundred ninety-two dollars and fifty cents ($199,992.50).

VI. It denies each and every allegation contained in Paragraph Twelfth thereof, except that it has made no payments to the plaintiffs or any of them from the account with it of the Shanghai Nanking Railway Administration.

VII. It denies each and every allegation contained in Paragraph Eighteenth thereof, except that on October 17, 1950 and after the receipt by it of the original of a document designated "Certification Pursuant to Section 25(b) of the Federal Reserve Act, as amended" and documents annexed thereto, it received for collection a check in the face amount of Two hundred thousand dollars ($200,000.00) purporting to be to the order of Mr. C. Y. Hsiao dated October 9, 1950 purporting to be signed by Shanghai Nanking Railway Administration by H. Moh, Managing Director and C. Sau, Adviser-Chief Secretary and that it refused payment thereof.

For a first complete defense to the alleged cause of action set forth in the complaint

The defendant alleges:

VIII. The defendant is a banking corporation organized and existing under the laws of the United States, having its head office and principal place of business at 55 Wall Street, New York City, and is, and at all times mentioned in the Complaint was, an insured bank within [fol. 13] the meaning of said phrase as defined in the Federal Reserve Act. At all times mentioned in the Complaint and up until August 14, 1950, the defendant maintained and operated a branch office in the City of Shanghai, China.

IX. On or about December 3, 1948, the defendant at its head office, 55 Wall Street, New York City, received a cable from its Shanghai branch advising it that the Nanking Shanghai Railway Administration requested the defendant to accept two hundred fifteen thousand dollars ($215,000.00) as an initial deposit for an account to be opened in the name

of the Nanking Shanghai Railway Administration at the defendant's head office in New York.

X. On information and belief, the plaintiff, "Shanghai Nanking Railway Administration," is sometimes referred to as the "Nanking Shanghai Railway Administration" and under various and sundry minor variations of said name and will be referred to hereinafter as the Shanghai Nanking Railway Administration, the name in which the defendant received the deposit hereinafter mentioned.

XI. On or about December 21, 1948, defendant received at its head office the sum of two hundred thousand dollars ($200,000.00) and no more, for the account of the said Shanghai Nanking Railway Administration and thereafter duly established an account on its books in said name in the credit of two hundred thousand dollars ($200,000.00).

XII. No further credits have been made to said account and no debits have been made thereto except for the sum of seven dollars and fifty cents ($7.50) charged against the said account by the defendant for certain banking services rendered and the account is now in credit in the amount of one hundred ninety-nine thousand nine hundred ninety-two [fol. 14] dollars and fifty cents ($199,992.50).

XIII. On information and belief, the opening or establishment of the said account was duly authorized by one Chen Po-chuang who was, at the time of the receipt of the two hundred thousand dollars ($200,000.00), as aforesaid, a director of the said Shanghai Nanking Railway Administration and as such had the authority to direct the opening of the account for and in behalf of the said Shanghai Nanking Railway Administration. Thereafter, the Shanghai branch of the defendant received a copy of a letter dated January 29, 1949, purporting to be signed by Yue Ta-wei who purported to sign under the title of "Minister" on behalf of the Ministry of Communications, addressed to one Wang Chao-huai, stating that the director of the said Shanghai Nanking Railway Administration, Chen Po-chuang, had been transferred and purporting to appoint the said Wang Chao-huai as acting director of the said Shanghai Nanking Railway Administration. Thereafter, the defendant was advised of various and sundry changes from time to time in the personnel of the officers

and directors of the said Shanghai Nanking Railway Administration, but at no time did the defendant receive at its head office any authentication from the Shanghai Nanking Railway Administration, or any other organization of similar name, of the powers of the said Chen Po-chuang, Wang Chao-huai, or any other person to sign, singly or jointly, with one or more others on the said account or otherwise to receive, control or dispose thereof in whole or in part and no checks, drafts or other directions or demands for withdrawal from or debits to the said account or any part thereof, have ever been made except as follows:

(a) The defendant received a letter from the Chinese Embassy, Washington, D. C., dated August 25, 1949, [fol. 15] signed by T. L. Tsui, Counselor of Embassy, incorporating the terms of a document stated to have been received from the Ministry of Communications of the Republic of China. A copy of the said letter is attached hereto as Exhibit "A" and for the exact terms thereof, reference is made thereto.

(b) Defendant received a letter dated February 14, 1950, purporting to be signed on behalf of the Shanghai Nanking Railway Administration (Nanking Shanghai Railway System Administration) by K. F. Mok and Y. T. Yu, requesting the defendant to close the account and transfer the balance to the account of the National Commercial Bank, Shanghai, for the account of Bank of China. A copy of the said letter is attached hereto as Exhibit "B" and for the exact terms thereof, reference is made thereto.

(c) A check in the face amount of $203,000, being the full amount of the credit balance in the said account, was presented for payment to the defendant on October 18, 1950 purporting to be drawn on the said account to the order of one C. Y. Hsiao dated October 9, 1950, and purporting to be signed on behalf of the Shanghai Nanking Railway Administration by H. Moh, as managing director thereof, and C. Sau, as adviser-chief secretary thereof, the check herein referred to being the said check mentioned in the Complaint herein.

(d) A check in the face amount of $206,000 was presented to the defendant for payment on August 24, 1951, subsequent to the commencement of this action, purporting to be drawn on the said account to the order of one C. Y. Hsiao, dated June 27, 1951, and purporting [fol. 16] to be signed on behalf of the Shanghai Nanking Railway Administration by H. Moh (Moh Han), director, and by C. Sau (Sau Chen), deputy director.

XIV. The defendant did not and has not complied with any of the said demands either in whole or in part and the said account has not been debited at the request of any person whatsoever and no debit has been made to the account except for banking charges as specifically set forth in paragraph XII hereof.

XV. On information and belief, neither of the signers of the two checks above referred to in sub-paragraphs designated (c) and (d) of paragraph XIII hereof, nor the signers of the letters referred to in sub-paragraphs (a) and (b) of paragraph XIII hereof, have at any time had any authority whatsoever to receive, control or dispose of the said account or any part thereof.

For a second complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and realleges each and every allegation contained in the foregoing first defense, and further alleges:

XVI. On or about April 7, 1941, an amendment to the Federal Reserve Act, known as Section 25(b) thereof, duly became law having been duly passed by the Congress of the United States and duly signed by the President. A copy of the relevant portions of the said amendment to the Federal Reserve Act is annexed hereto marked Exhibit "C" and made a part hereof and for the exact terms thereof, reference is made thereto.

[fol. 17] XVII. The said law at all times mentioned in the Complaint, provided and still provides, subject to the terms and conditions therein expressed, that whenever an insured bank has received any property from or for the account of a foreign state which is recognized by the Govern-

[fol. 34] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' NOTICE OF MOTION TO DISMISS COUNTERCLAIMS—
Filed September 15, 1952

SIRS:

Please take notice that the plaintiff The Republic of China will move this Court at a special term for the hearing of motions, at Room 506, United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York on the 7th day of October, 1952, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, to dismiss, pursuant to Rule 12 F. R. C. P., the counterclaims pleaded by the defendant against plaintiff The Republic of China on the following grounds:

1. That the Court lacks jurisdiction thereof because plaintiff The Republic of China is a friendly sovereign which has not consented to be sued on the matters therein alleged.

2. That they fail to state claims against plaintiff The Republic of China upon which relief can be granted.

and for such other, further and different relief as to the Court may seem just and proper.

Dated, New York, N. Y., September 15, 1952.

Yours, etc., Kirlin, Campbell & Keating, By Louis J. Gusmano, A Member of the Firm, Attorneys for Plaintiffs, Office & P. O. Address, 120 Broadway, New York 5, N. Y.

[fol. 35] To: Shearman & Sterling & Wright, Esqs., Attorneys for Defendant, 20 Exchange Place, New York, N. Y.

ment of the United States, or from or for the account of a central bank of such foreign state and holds such property in the name of such foreign state or central bank, the Secretary of State may certify to such insured bank the authority of a person duly designated by such foreign state to the Secretary of State to receive, control and dispose of such property. Said law further provides that if the Secretary of State certifies to an insured bank the authority of a person certified to him by the said foreign state, the payment, transfer, delivery or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property.

XVIII. On or about August 23, 1950, defendant received by mail from the Secretary of State certain documents purporting to be a certificate granted pursuant to the terms and conditions of Section 25(b) of the Federal Reserve Act, as amended, at the request of the plaintiff, the Republic of China, said certification being the same certification referred to in the Complaint herein which purported to grant to one Moh Han, as the alleged director of the Shanghai Nanking Railway Administration, and one Sau Chen, as the alleged deputy director of the Shanghai Nanking Railway Administration, the authority to receive, control and dispose of the bank account received by the defendant and held in the name of the Shanghai Nanking Railway Administration.

[fol. 18] XIX. On information and belief, the certificate received from the Secretary of State by the defendant herein, being the document referred to in the Complaint, was not executed by the Secretary of State in accordance with the purpose and intent of the said Section 25(b) of the Federal Reserve Act; was not given or granted in accordance with the foreign policy of the United States; and that the purported effort by the Secretary of State in granting to the plaintiffs, Moh Han and Sau Chen, authority to receive, control and dispose of property received by the defendant from the Shanghai Nanking Railway Administration and held by it in the name of the said Administration, is null and void for all purposes whatsoever.

IN UNITED STATES DISTRICT COURT

APPEARANCES:

Kirlin, Campbell & Keating, Attorneys for Plaintiff, The Republic of China, Cletus Keating, Robert E. Kline, Jr., Louis J. Gusmano, of Counsel.

Shearman & Sterling & Wright, Attorneys for Defendant, Chauncey B. Garver, W. Harvey Reeves, of Counsel.

OPINION, KAUFMAN, J., GRANTING PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS—December 22, 1952

IRVING R. KAUFMAN, D. J.:

Plaintiffs, The Republic of China, and others, have commenced an action against the defendant, under Section 632 of Title 12, U. S. C. to recover the sum of $200,000 said to be on deposit with defendant and which the defendant refuses to pay. This sum was deposited in the name of plain- [fol. 36] tiff, Shanghai-Nanking Railway Administration, said to be an agency of the Ministry of Communications of the plaintiff, The Republic of China. The Secretary of State, pursuant to Section 25(b) of the Federal Reserve Act has certified to defendant that the deposit in question belongs to the plaintiff. Defendant has denied the essential allegations of the complaint, pleaded affirmative defenses, and has asserted two counterclaims against plaintiff, The Republic of China. The first counterclaim alleges that on or about August 9, 1920, defendant participated in a loan made by J. P. Morgan & Co. to the Pacific Development Co. in the face amount of $5,000,000, said loan being secured by a $5,500,000 Chinese Government Treasury Note, being the Note of the plaintiff herein, The Reublic of China. Said loan was not paid on its maturity date by Pacific Development Company and subsequently Pacific Development Company was liquidated. In the course of said liquidation, J. P. Morgan & Co. offered the collateral for sale at public auction and purchased the collateral on behalf of the participants in the loan to the Pacific Development Company. The Chinese Government Treasury Note is still held by J. P. Morgan & Co. and is now past due, and by virtue

For a third compete defense to the Alleged Cause of Action set forth in the Complaint.

The defendant repeats and realleges each and every allegation contained in the foregoing first and second defenses, and further alleges:

XX. On information and belief, the plaintiff, Shanghai Nanking Railway Administration, is neither a "foreign state" nor a "central bank" in accordance with the definition thereof in Article 25(b), Paragraph 3 of the Federal Reserve Act and, therefore, any certificate by the Secretary of State of the United States of America purporting to grant authority to any person to receive, control or dispose of said account or otherwise exercise any control or dominion over such account is null and void.

[fol. 19] For a fourth complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and realleges each and every allegation contained in the foregoing first, second and third defenses, and further alleges:

XXI. The defendant received the property from the Shanghai Nanking Railway Administration and at all times mentioned in the complaint held and still holds the same in the account of Shanghai Nanking Railway Administration; and, on information and belief, it did not receive such property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and at no time has it held, and it does not now hold, such property in the name of such foreign state or such central bank; and, therefore, any certificate by the Secretary of State of the United States of America purporting to grant authority to any person to receive, control or dispose of said account or otherwise exercise any control or dominion over such account is null and void.

For a fifth complete defense to the alleged cause of action set forth in the complaint

thereof there is said to be owing to the defendant the sum of $317,720.93 plus interest of $590,386.53.

For a second counterclaim against plaintiff, The Republic of China, the defendant alleges that between April and August 1947 defendant began the purchase of Chinese Government 36th Year Short Term Treasury Notes of The Republic of China. On these notes, the plaintiff, The Republic of China, is said to be indebted to the defendant in the sum of $391,033.60 principal together with interest thereon in the sum of $335,290.94. Defendant demands judgment against the plaintiffs dismissing the complaint with costs, and against the plaintiff, The Republic of China, for the sum of $1,634,432.

[fol. 37] Plaintiff, The Republic of China, has moved pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss the counterclaims on the following grounds:

> (1) That the Court lacks jurisdiction thereof because plaintiff, The Republic of China, is a friendly sovereign which has not consented to be sued on the matters therein alleged.
>
> (2) That they fail to state claims against plaintiff, The Republic of China, upon which relief can be granted.

In opposition to this motion, the defendant has advanced the contention that the motion is premature because there is no proof before this Court that the property is that of a sovereign. The defendant has alleged that the Shanghai-Nanking Railway Administration is not a mere agency of the government but has independent existence and that the plaintiff, The Republic of China, is not in a position to sue and recover on this bank account. This allegation is contained in the affirmative defenses which defendant has asserted. In support of the contention that whether the organization in whose name the property is held is a sovereign or at least an agency of a foreign sovereign exercising governmental functions is a matter which must be proved by the plaintiff, defendant relies on such cases as *Chase National Bank* v. *Directorate General of Postal Remittances & Savings Bank*, 278 App. Div. 820, 824, 105 N. Y. S. 2d 416 (1st Dept. 1951), on reargument 278 App. Div.

The defendant repeats and realleges each and every allegation contained in the foregoing first and second defenses, and further alleges:

XXII. On information and belief, in the exercise of foreign policy, the State Department of the United States Government has determined that the hostilities, as a result of which the plaintiff, Republic of China, was driven from the mainland of China, was a civil war, waged on the main- [fol. 20] land of China by Chinese nationals, revolutionaries to the said plaintiff. It is the policy of the United States not to intervene in the internal political affairs of foreign nations, including the determination and outcome of civil wars which may be fought therein, nor to determine, as between the recognized government of such a country and the rebels or revolutionaries to that government who at any time may have set up governmental control over the whole or part of the territory of said government, which thereof has the right, title and interest in or to property within the United States received from or for the account of a foreign state which is recognized by the government of the United States or from or for the account of a central bank of such foreign state and held by such insured bank in the name of such foreign state or such central bank. Any act determining or purporting to determine which of two rival contending governments of such a country, or representatives thereof, has such right, title and interest in or to such property or the right or authority to receive, control and dispose thereof, is an intervention in the internal political affairs of such country and is contrary to the policy of the United States and beyond the authority and competence of the Secretary of State.

For a sixth complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and realleges each and every allegation contained in the foregoing first, second, third and fourth defenses, and further alleges:

XXIII. On information and belief, Section 25(b) of the Federal Reserve Act, in so far as it gives or purports to give judicial authority to the Secretary of State to determine as between two rival claimants the right, title and

935, 105 N. Y. S. 2d 923, 924; leave to appeal denied, 279 App. Div. 576, 107 N. Y. S. 2d 542; appeal dismissed, 303 N. Y. 800 (1952); *Hannes* v. *Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189, 20 N. Y. S. 2d 825 (1st Dept. 1940); *Telkes* v. *Hungarian National Museum*, 265 App. Div. 192, 38 N. Y. S. 2d 419 (1st Dept. 1942).

[fol. 38] While this point might be well taken if it were directed to a motion to strike the affirmative defenses it is wholly inappropriate here for the simple reason that the counterclaims in question are pleaded, not against the Shanghai-Nanking Railway Administration but against The Republic of China itself.

There is no contention that The Republic of China is not a friendly foreign sovereign. In fact in paragraph XXXIV of the counterclaim, defendant admits that:

> "The plaintiff, The Republic of China, is, and at all times hereinafter mentioned was, a sovereign government recognized as such by the duly appointed Executive Department of the Government of the United States."

As a second ground for opposing the motion defendant asserts that the plaintiff cannot show right of sovereign immunity as claimed because plaintiff voluntarily came to this Court and is using its facilities to collect a debt. But it is well settled that counterclaims may not be asserted against a friendly foreign sovereign unless they are based on the subject matter of the suit. *United States* v. *New York Trust Co.*, 75 F. Supp. 583 (D. C. S. D. N. Y. 1946). *Republic of China* v. *American Express Co.*, C. A. 2, 1952, 195 F. 2d 230, 233. When the counterclaim is based on the same subject matter the court may say that the sovereign "has waived immunity" or "consented to suit". These are legal fictions based on the notion that it would be exceedingly inequitable to allow any plaintiff to function as a normal litigant when it is to its advantage to do so, but to raise the shield of sovereign immunity with respect to the same matter, when the tides are turned against it. But, the bringing of an action against a defendant cannot be said to be consent by plaintiff to suit for any unre-[fol. 39] lated claims which defendant may have against

interest in or to property within the United States is un- [fol. 21] constitutional as an attempt to grant to a branch of the executive department powers which are the sole prerogative of the judicial department.

For a seventh complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and reallages each and every allegation contained in the foregoing first, second, third and fourth defenses, and further alleges:

XXIV. On information and belief, the plaintiff, Shanghai Nanking Railway Administration, is a corporation organized and existing under the laws of China and formerly carried on the business of managing, controlling, financing or otherwise operating or assisting in the operation and control of a railroad within the mainland of China.

XXV. On information and belief, the law of the Republic of China, known as the "Company Law of China," hereinafter referred to as the "Company Law," was duly promulgated by the Republic of China on April 12, 1946, on which date it became effective as to said plaintiff.

XXVI. On information and belief, the Company Law of China since April 12, 1946, provided and still provides in Ch. I, Article 8 thereof, that "the term head office as used in this law denotes the principal office first established according to law to take charge of the affairs of the entire organization."

XXVII. On information and belief, the Company Law of China at all times since April 12, 1946, provided and still provides in Ch. II, Article 13 thereof, that "the domicile of the company is the location of its head office."

[fol. 22] XXVIII. On information and belief, the domicile of the plaintiff, Shanghai Nanking Railway Administration, is and at all times has been, in the City of Shanghai, China, which was originally designated as the head office thereof and no other designation or change of seat has been made in accordance with law and the said head office continues as a matter of law to be the domicile thereof.

XXIX. On information and belief, the plaintiffs, Moh Han and San Chen, are not now and were not at the time of the purported demand upon the defendant for with-

that government. Compare the opinion in *State of Russia* v. *Bankers Trust Company*, 4 F. Supp. 417, 420 (D. C. S. D. N. Y. 1933) with that of the Court of Appeals in affirming *sub nom United States* v. *National City Bank of New York*, 83 F. 2d 236, cert. denied. 299 U. S. 563 (1936). It is not alleged, nor is it urged, as indeed it could not be, that the counterclaims here arise out of the same subject matter covered in the complaint. Rather, defendant relies on such cases as *United States* v. *National City Bank of New York*, *supra*, and *United States v. National City Bank of New York*, 90 F. Supp. 448, (D. C. S. D. N. Y. 1950), to support the proposition that the right to counterclaim against a sovereign depends upon "the equities" of that claim. In these cases plaintiffs sued to recover money on deposit with the defendant bank and were met with counterclaims for amounts due on Russian Treasury notes. The Court of Appeals held that the notes, payable at the defendant bank were equivalent to an order to pay the same from the account of the debtor under the New York Negotiable Instruments Law and allowed the counterclaims while affirming the principle that only claims arising out of the same transaction may be set-off against a sovereign. But closer to the facts of the instant case, where there is absent any allegation that the notes in question are payable at the bank holding the deposit, is the case of *United States* v. *New York Trust Company*, 75 F. Supp. 583 (D. C. S. D. N. Y. 1946) where the Court disallowed the counterclaim stating that the notes were unrelated to the deposit transaction and therefore were not available against the sovereign without its consent.

Other contentions of the defendant require but brief discussion. One, that the plea of sovereign immunity is not properly before this Court presents much the same issues [fol. 40] as the defendant's argument based on the alleged independent corporate nature of the Shanghai-Nanking Railway. With respect to the counterclaim we do not have a case where a sovereign is asserting that property in another's possession is actually state property, as was the case in *Kunglig Jarnvagsstyrelsen (Swedish State Railways)* v. *Dexter & Carpenter* (C. A. 2, 1929) 32 F. 2d 195, cert. denied 280 U. S. 579 (1929) and *Anderson* v. *N. V.*

drawals or transfers of the account of the Shanghai Nanking Railway Administration, at the head office thereof or authorized by the head office to make such withdrawals or otherwise to act for or on behalf of the plaintiff, Shanghai Nanking Railway Administration, and all acts or purported acts done by them on behalf of the plaintiff, Shanghai Nanking Railway Administration are null and void.

For an eighth complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and realleges each and every allegation contained in the foregoing first, second, third and fourth defenses; and further alleges:

XXX. On information and belief, the plaintiff Shanghai Nanking Railway Administration, is a corporation organized and existing under the laws of China for the purpose of receiving and disbursing funds and otherwise having supervision of the operation and control of a railroad operating on the mainland of China, sometimes referred to as the Shanghai Nanking Railway.

XXXI. On information and belief, the Company Law [fol. 23] of China on April 12, 1946 provides, and still provides in Ch. II, Article 22 thereof, that "a company shall not engage in any business outside of the scope of the purposes for which it has been registered."

XXXII. On information and belief, the plaintiffs, Moh Han and Sau Chen, purporting to act for the said plaintiff, Shanghai Nanking Railway Administration, are not now, nor have they, at any time on or since the demand made upon this defendant, been engaged in any activity relating to the financing, operation, maintenance or otherwise, of the Shanghai Nanking Railway and no funds received by the said persons purportedly for or on behalf of the Shanghai Nanking Railway Administration are or will be used for the said purpose and any disposition of funds contrary to the purpose for which the said organization was created is illegal pursuant to the Company Law of China as aforesaid.

For a first counterclaim against plaintiff, the republic of China

Transandine, 289 N. Y. 9, 43 N. E. 2d, 502 (1942). Here, as was said previously, the counterclaim is brought against plaintiff, The Republic of China, and the sovereignty of this plaintiff is unquestioned, and indeed alleged by the defendant (paragraph XXXIV of answer). An additional argument that the defendant has a right to make its debit by reason of a banker's lien has no validity in this context.

The motion to dismiss the counterclaim is hereby granted. Settle order.

Dated: New York, N. Y., December 22, 1952.

Irving R. Kaufman, U. S. D. J.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES DISTRICT COURT

ORDER AND JUDGMENT GRANTING PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS—January 9, 1953

Plaintiff, The Republic of China, having moved to dismiss the counterclaims pleaded by the defendant against the said plaintiff, The Republic of China, on the ground that the Court lacks jurisdiction thereof because plaintiff, The Republic of China, is a friendly sovereign which has not consented to be sued on the matters therein alleged, and on the further ground that they fail to state claims against plaintiff, The Republic of China, upon which relief can be granted, and after hearing counsel for the respective parties and on filing the opinion of the Court, and it appearing that the said counterclaims are the only counterclaims contained in the answer of the defendant herein, it is

Ordered that the said motion be and is hereby granted, and it is further

Ordered that in accordance with rule 54(b) of the Federal Rules of Civil Procedure, it is hereby determined that there is no just reason for delay and the entry of judgment is accordingly directed, and it is

The defendant alleges:

XXXIII. The defendant is, and at all times hereinafter mentioned was, a banking corporation organized and existing under the laws of the United States of America, having its principal place of business at No. 55 Wall Street, New York City, and maintaining and operating a branch, among others, at Shanghai, China, until August 14, 1950.

XXXIV. The plaintiff, The Republic of China, is, and at all times hereinafter mentioned was, a sovereign government recognized as such by the duly appointed Executive Department of the Government of the United States. [fol. 24] XXXV. On or about August 9, 1920, the defendant participated in a loan made by J. P. Morgan & Co. to the Pacific Development Company in the face amount of five million dollars ($5,000,000), said loan being secured by a five million, five hundred thousand dollar ($5,500,000) Chinese Government Treasury Note, being the Note of the plaintiff herein, The Republic of China. Said loan was not paid on its maturity date by Pacific Development Company in accordance with its terms and subsequently Pacific Development Company was liquidated. In the course of the liquidation and in furtherance thereof, on April 4, 1928, J. P. Morgan & Co. offered the collateral for sale at public auction and purchased the said collateral on behalf of the participants in the said loan to the Pacific Development Company. The said Chinese Government Treasury Note is still held by J. P. Morgan & Co. and is now past due in accordance with its terms, and the defendant herein has a participating interest therein in the amount of Three hundred seventeen thousand, seven hundred twenty dollars and ninety-three cents ($317,720.93) principal amount. At all times subsequent to the purchase by J. P. Morgan & Co., as aforesaid, the interest of the defendant in the said Note was known to the plaintiff herein, The Republic of China, which recognized its indebtedness thereon to the defendant. No part of the defendant's participation in the principal of said Note has been paid, although payment thereof has been duly demanded. There is now due from the plaintiff, The Republic of China, to the defendant on account of the principal, as aforesaid, the sum of three hundred seventeen thousand,

Ordered and adjudged that all the counterclaims contained in the answer herein be and are hereby dismissed.

Dated: New York, New York, January 8, 1953.

(S.) Irving R. Kaufman, U. S. D. J.

Judgment entered this 9 day of January, 1953.

(S.) William V. Connell, Clerk.

[fol. 42] In United States District Court

[Title omitted]

Notice of Appeal—Filed February 4, 1953

Sirs:

Notice is hereby given that The National City Bank of New York, defendant herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the final order and judgment dated January 8, 1953 and entered in this action on January 9, 1953 in the office of the Clerk of this Court, by which it was ordered that the motion by the plaintiff, The Republic of China, to dismiss the counterclaims contained in defendant's amended answer be granted and determining that, because there was no just reason for delay, the entry of judgment be directed, and by which it was ordered and adjudged that all the counter-[fol. 43] claims contained in the defendant's answer herein be dismissed, and that the defendant appeals from each and every part of said order and judgment as well as from the whole thereof.

Dated, New York, N. Y., February 3, 1953.

Yours, etc., Shearman & Sterling & Wright, By Chauncey B. Garver, a Member of the Firm, Attorneys for defendant, The National City Bank of New York, 20 Exchange Place, New York, New York.

To: Messrs. Kirlin, Campbell & Keating, Attorneys for plaintiff, The Republic of China, 120 Broadway, New York 5, New York.

[fols. 44-45] Designation as to Contents of Record—Filed March 4, 1953 (omitted in printing)

seven hundred twenty dollars and ninety-three cents ($317,720.93) plus interest as of the date hereof amounting to five hundred ninety thousand, three hundred eighty six and 53/100 dollars ($590,386.53).

[fol. 25] For a second counterclaim against plaintiff, the Republic of China.

The defendant repeats and realleges every allegation contained in paragraphs XXXIII and XXXIV of the foregoing first counterclaim, and further alleges:

XXXVI. Between the dates of April and August, 1947, defendant, by its Shanghai branch, began the purchase of Chinese Government 36th Year Short Term Treasury Notes of the Republic of China, pursuant to the terms of which the plaintiff, The Republic of China, agreed to pay the face amount of each of said Notes within three years, redemptions every six months, as more particularly set forth in the said Notes, a copy of one of which is annexed hereto as Exhibit "D" which is made a part hereof and for the exact terms of said Note reference is made thereto.

XXXVII. Each of said Notes bore the same terms and conditions and differed only in the face amount and the maturity dates thereof. Said Notes were by their terms to be paid in national currency at the United States dollar exchange rate of the Central Bank of China prevailing on the day of payments.

XXXVIII. The defendant made such purchases from time to time in accordance with the following schedule:

Date of Purchase	U. S. Dollars Amount	Conversion Rate	Chinese National Currency
April to August, 1947	$300,000.00	12,000	$ 3,600,000,000
October 2, 1947	$ 50,000.00	50,100	$ 2,505,000,000
October 25, 1947	$ 50,000.00	55,700	$ 2,785,000,000
March 23, 1948	$ 92,000.00	258,500	$23,782,000,000
March 23, 1948	$ 8,333.00	244,649	$ 2,038,660,117
March 24, 1948	$ 10,832.90	233,523	$ 2,529,731,300
March 25, 1948	$ 19,624.70	233,513	$ 4,582,692,625

[fol. 26] XXXIX. No payments on account of the principal or interest of the said Notes have been made by or on behalf of the plaintiff, The Republic of China, except the

[fol. 46] IN UNITED STATES DISTRICT COURT

DEFENDANT'S NOTICE OF MOTION FOR REARGUMENT AND FOR LEAVE TO AMEND COUNTERCLAIMS, ETC.—Filed January 22, 1953

SIRS:

Upon the summons and complaint and the amended answer herein and the affidavits of W. Harvey Reeves and George F. Nolte, both duly verified January 22, 1953, and upon the order of this Court and a judgment thereof dated January 8, 1953 duly filed on January 9, 1953 as the Court's determination of a motion heretofore made by plaintiff, The Republic of China, on September 15, 1952, by which the Court granted said motion and dismissed the counterclaims, and upon the opinion of the Court herein dated December 22, 1952, copies of all of which are attached hereto as exhibits, the defendant, The National City Bank of New York, hereby makes a motion in this Court pursuant to Rule 9 of the Rules of the United States District Courts for the Southern and Eastern Districts of New York for an order:

1. Granting leave to the defendant, said The National City Bank of New York, for re-argument of the said motion by the plaintiff for dismissal of the counterclaims of the defendant on the grounds that:

a. The Court in dismissing the said counterclaims has overlooked controlling decisions of this and other courts and the Supreme Court of the United States;

b. The Court in dismissing the said counterclaims without adequate provision for the amending thereof, particularly to permit the defendant to show that as to one counterclaim the obligation was payable at [fol. 47] the defendant Bank and in the other that the defendant Bank was one member of a syndicate of various banks and that the obligation was payable at one of the said banks for the protection and convenience of all, including the defendant, has seriously and unduly prejudiced the defendant.

c. The Court has failed to take into consideration

partial payments as to principal and as to interest as shown in the following schedule:

Date of Partial Payment of Principal or Interest as Indicated	U. S. Dollars Amount	Conversion Rate	Chinese National Currency
October 1, 1947	$49,998.00 (principal)	48,000	$ 2,444,902,200
October 1, 1947	$28,500.00 (interest)	48,900	$ 1,393,650,000
March 31, 1948	$57,760.20 (principal)	251,500	$14,526,690,300
March 31, 1948	$31,998.80 (principal)	251,500	$ 8,047,698,200
April 1, 1948	$45,675.00 (interest) (approximate)	251,500	$11,487,262,500 (approximate)

XL. As of the date hereof the plaintiff, The Republic of China, is indebted to the defendant on account of the principal of the said Notes in an amount of local currency equal to the sum of three hundred ninety one thousand, thirty three dollars and sixty cents ($391,033.60) in United States dollars, together with interest thereon in an amount of local currency equal to the sum of three hundred thirty five thousand, two hundred ninety and 94/100 dollars ($35,290.94) in United States dollars.

Wherefore, defendant demands judgment against the the plaintiffs dismissing the complaint herein with costs, and against the plaintiff, The Republic of China, for the sum of one million, six hundred thirty four thousand, four [fol. 27] hundred thirty two and no/100 dollars ($1,634,-432.00) with interest and costs.

Dated: New York, N. Y., July 11, 1952.

Shearman & Sterling & Wright, By Chauncey B. Garver, A Member of the Firm, Attorneys for the defendant, The National City Bank of New York, 20 Exchange Place, Borough of Manhattan, City of New York.

To: Messrs. Kirlin, Campbell & Keating, Attorneys for plaintiffs, 120 Broadway, New York 5, New York.

(i) the policy of the State Department that sovereign immunity should not be granted except where the said State Department has found that the granting thereof was in the interests of the United States and has so informed the Court and (ii) the absence in this case of any such information from the State Department.

2. Vacating the said order and judgment entered herein on January 9, 1953 or in the alternative directing the resettlement of the said order and judgment to permit the defendant to amend the said counterclaims and each of them.

The defendant at the same time and place hereby makes a motion in this Court for an order:

3. Granting leave to the defendant to submit within ten days after the final determination hereof a further amended answer in which shall be included amendments to the said counterclaims and particularly as to the claim designated first counterclaim, also to designate the same as "set off" and to allege therein in addition to present allegations the manner and place of the payment of the obligation therein set forth and as to the claim designated second counterclaim also to designate the same as "set off" and to allege therein in addition to present allegations, particularly that the paying agents of said obligations for the plaintiff, The Republic of China, were the Central [fol. 48] Bank of China and its appointed banks; that the Shanghai branch of The National City Bank of New York, defendant herein, was an appointed bank and one of the places at which the said obligations were payable and for such other amendments as may seem pertinent, and

4. For such other and further relief as may be just.

Take notice that we will bring the above motion on for hearing before this Court at Room 506, United States Court House, Foley Square, City, County and State of New York, on January 29, 1953 at 10:00 o'clock in the forenoon of that day pursuant to Rule 9 of the rules of this Court above stated, and

Take further notice that pursuant to Rule 6 of the United States Rules of Civil Procedure you are required to serve

EXHIBIT A TO AMENDED ANSWER

Chinese Embassy, Washington 8, D. C.

August 25, 1949.

Mr. C. C. Ransom, The National City Bank of New York, 55 Wall Street, New York, New York.

DEAR MR. RANSOM:

Confirming our telephone conversation, I beg to inform you that this Embassy has received a document from the [fol. 28] Ministry of Communications of the Republic of China, informing us to the following effect:

> The Ministry of Communications has an account in the name of the Shanghai-Nanking Railway Administration with the New York Office of the National City Bank of New York. A sum of $200,000.00 (US currency) was deposited to the said account. Mr. Wang Chao-Huai, Acting Administrator, and Mr. Wang Yun-Hsun, Chief Secretary, or Mr. Chen Peh-Chuang, Advisor, were authorized to make withdrawals. In April, 1949, Mr. Chen Fu-hai was appointed to replace Mr. Wang Chao-Huai as Administrator and Mr. Chen had duly informed the National City Bank of New York to cancel the authority of Mr. Wang, and Mr. Wang or Mr. Chen, to make withdrawals against the account.
>
> When the situation in Shanghai was precarious, there was no need for the fund. A letter was then addressed to the Shanghai Office to the National City Bank of New York to cancel the authority of Mr. Chen Fu-hai to make withdrawals, to close the account, and to remit the balance of the account to the Ministry of Communications.
>
> The Ministry of Communications now requests that money be either paid to Dr. Hsiao Ching-yun, Director of the Office in the United States of the Ministry of Communications, or remit the money directly to the Ministry of Communications through the Hongkong Office of the National City Bank of New York.

answering affidavits not later than one day before the hearing thereof.

Dated: New York, N. Y., January 22, 1953.

Yours, etc. Shearman & Sterling & Wright, By Sgd. C. B. Garver, Member of the Firm, Attorneys for the defendant, The National City Bank of New York, sued herein as National City Bank of New York, 20 Exchange Place, Borough of Manhattan, City of New York.

[fol. 49] To: Messrs. Kirlin, Campbell & Keating, Attorneys for the Plaintiffs, 120 Broadway, New York 5, N. Y.

Affidavit of W. Harvey Reeves, Read in Support of Defendant's Motion

State of New York,

County of New York—ss:

W. Harvey Reeves, being duly sworn, says:

1. I am an attorney associated with the firm of Shearman & Sterling & Wright, attorneys for the defendant, The National City Bank of New York (hereinafter referred to as "City Bank"), and am fully familiar with all the proceedings heretofore had herein and with the facts hereinafter set forth.

2. The Republic of China made a motion in this Court to dismiss the counterclaims pleaded by the defendant against the plaintiff, The Republic of China, on the grounds:

(1) That the Court lacks jurisdiction thereof because plaintiff The Republic of China is a friendly sovereign which has not consented to be sued on the matters therein alleged.

[fol. 50] (2) That they fail to state claims against plaintiff The Republic of China upon which relief can be granted.

By order and judgment of this Court entered on the 9th day of January, 1953, this motion was granted in its entirety. The opinion of the Court herein was handed down on December 22, 1952.

[fol. 29] We shall appreciate it if you would comply with the request of the Ministry of Communications at your early convenience.

Yours sincerely, T. L. Tsui, Counselor of Embassy.

EXHIBIT B TO AMENDED ANSWER

Nanking-Shanghai Railway System Administration
Chinese National Railways

Shanghai, 14th February, 1950.

The National City Bank of New York, Overseas Division,
55 Wall Street, New York 15, N. Y.

DEAR SIRS:

Please accept this letter as your authority to close our account with you and transfer the outstanding balance to the account of the National Commercial Bank, Shanghai, for account of the Bank of China. Please confirm by cable to the National Commercial Bank, Shanghai, the amount transferred.

Yours very truly, K. F. Mok, Y. T. Yu.

[fol. 30] EXHIBIT C TO AMENDED ANSWER

Relevant portions of Section 25(b) of the Federal Reserve Act (Title 12, U. S. C. Section 632) in part.

"Whenever (1) any insured bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of

3. The Republic of China, the moving party, is one of several plaintiffs, the others being Shanghai-Nanking Railway Administration and two individuals claiming to be a Director and Deputy Director of the Shanghai-Nanking Railway Administration.

4. The plaintiff seeks to recover of the defendant a banking account with it standing in the name of "Shanghai-Nanking Railway Administration" and alleges in Paragraph Fourth of the complaint that "at all times mentioned the plaintiff Shanghai-Nanking Railway Administration was and now is an agency of the Ministry of Communications of the plaintiff, The Republic of China." On this allegation and the presentation of a certificate of the State Department granted under Section 25(b) of the Federal Reserve Act as amended, on its ex parte representations to said State Department, it appears to base its claim of right to recover the said bank account.

The defendant admits the existence of the bank account. It denies it has any knowledge in regard to the claims by plaintiff; that the Shanghai-Nanking Railway Administration is an agency of the Ministry of Communications of The Republic of China, or if such fact would entitle the plaintiff to recover. Defendant has various affirmative defenses and also alleges two counterclaims. For the pleadings and the exact term of the counterclaims reference is made to the documents themselves, copies of which [fol. 51] are attached to the moving papers marked Exhibits A and B.

5. I verily believe that in deciding this motion reliance has been made on one or more cases which are not applicable to the facts as pleaded.

6. I further verily believe that inferences were drawn as to the non-existence of certain facts, and these inferences or facts were considered pertinent and in fact controlling but that the actual facts of the case negative the said inferences and that reconsideration on the law and the facts should be given because if the facts which exist but were not pleaded are still considered pertinent amendments should be permitted to the said counterclaims in order that all of the facts may properly be before this Court.

7. In accordance with the provisions of Rule 9 I have

such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to such insured bank, the payment, transfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property. Any suit or other legal proceeding against any insured bank or any officer, director, or employee thereof, arising out of the receipt, possession, or disposition of any such property shall be deemed to arise under the laws of the United States and the district courts of the United States shall have exclusive jurisdiction thereof, regardless of the amount involved; and any such bank or any officer, director, or employee thereof which is a defendant in any such suit may, at any time before trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

[fol. 31] "Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of sections 95a, 213, 411-415, 417, or 467 of this title, sections 311a, 315b, 316a, 316b, 405a, 408a, 408b, 440-446, 448-448e, 733-734b, 752, 754a, 754b, 757a, 767, 821, 822a, 822b, or 824 of Title 31, or section 5 (b) of Title 50, Appendix, or any actions, regulations, rules, orders, or proclamations taken, promulgated, made, or issued pursuant to any of such sections. In any case in which a license to act with respect to any property referred to in this section is required under any of said sections, regulations, rules, orders, or proclamations, notification to the Secretary of State by the proper Government officer or agency of the issuance of an appropriate license or that appropriate licenses will be issued on application shall be a prerequisite to any action by the Secretary of State pursuant to this section, and the action of the Secretary of State shall relate only to such property as is included in such notification. Each such notification shall include the terms and conditions of such license or licenses and a description of the property to which they relate.

submitted herewith a memorandum setting forth concisely the matter of controlling decisions and other matters which I verily believe should be reconsidered.

8. There is attached in support of this motion affidavit of Mr. George F. Nolte, Assistant Vice President of the defendant, The National City Bank of New York, setting forth additional facts concerning obligations of the sovereign plaintiffs referred to in each of the two said counterclaims.

Wherefore, I verily believe that the relief requested herein should be granted.

W. Harvey Reeves.

(Sworn to January 22, 1953.)

[fol. 52] Affidavit of George F. Nolte, Read in Support of Defendant's Motion

State of New York,
County of New York, ss:

George F. Nolte, being duly sworn, says:

1. I am Assistant Vice President of The National City Bank of New York, defendant herein, and am familiar with the proceeding in this action. I have in my custody and control the bank's files relating to the account of Shanghai-Nanking Railway Administration and also the bank's files relating to the two obligations of The Republic of China, the sovereign plaintiff herein, which are mentioned and set forth respectively in the First and Second Counterclaims.

2. I have read the opinion of Mr. Justice Irving Kaufman on the motion of plaintiff to dismiss the defendant's Counterclaims and the Order and Judgment entered thereon.

3. I have examined the bank's files in my custody relating to the obligation of The Republic of China, plaintiff, particularly referred to in the First Counterclaim and I find that as to the loan in question therein referred to, the defendant, The National City Bank of New York, was one of a large number of participants in said loan

"For the purposes of this section, (1) the term "property' includes gold, silver, currency, credits, deposits, securities, choses in action, and any other form of property, the proceeds thereof, and any right, title, or interest therein; (2) the term 'foreign state' includes any foreign government or any department district, province, county, possession, or other similar governmental organization or subdivision of a foreign government, and any agency or instrumentality of any such foreign government or of any such organization or subdivision; (3) the term 'central bank' includes any foreign bank or banker authorized to perform any one or more of the functions of a central bank; (4) the term 'person' includes any individual, or any corporation, partnership, association, or other similar organization; and (5) the term 'insured bank' shall have the meaning given to it in section 264 of this title."

[fol. 32] EXHIBIT D TO AMENDED ANSWER

One of the Chinese Government 36th year (1947) Short Term Treasury Notes of the Republic of China.

(Here follows 1 Photolithograph, side folio 33)

made by J. P. Morgan & Co. to the Pacific Development Corporation. J. P. Morgan & Co. acted as agent for itself and these other participants, including the defendant. The Pacific Development Corporation delivered to J. P. Morgan & Co as collateral for and to induce the making of the said loan a bearer note made by the plaintiff [fol. 53] herein, The Republic of China, in the sum of $5,500,000 payable at the office of The Chase National Bank of the City of New York, one of the principal participants.

4. I have examined the bank's files in my custody relating to the obligations of The Republic of China which are referred to particularly in the Second Counterclaim. I find that the 36th Year Short-Term Treasury Notes were payable by their terms at the offices of the Central Bank of China and its appointed banks. The Shanghai Branch of the defendant, The National City Bank of New York, was at the time of the issuance of these Notes an appointed bank as described in the said Notes and continued to function as such until the seizure of Shanghai by the forces of the People's Government of China in May, 1949. Therefore, in my opinion The National City Bank of New York, defendant herein, was one of the places of payment of the aforesaid 36th Year Short-Term Treasury Notes. The default in the said 36th Year Short-Term Treasury Notes, including those held by the defendant, The National City Bank of New York, occurred on September 30, 1948 when interest and amortization payments due on that date were defaulted.

George F. Nolte.

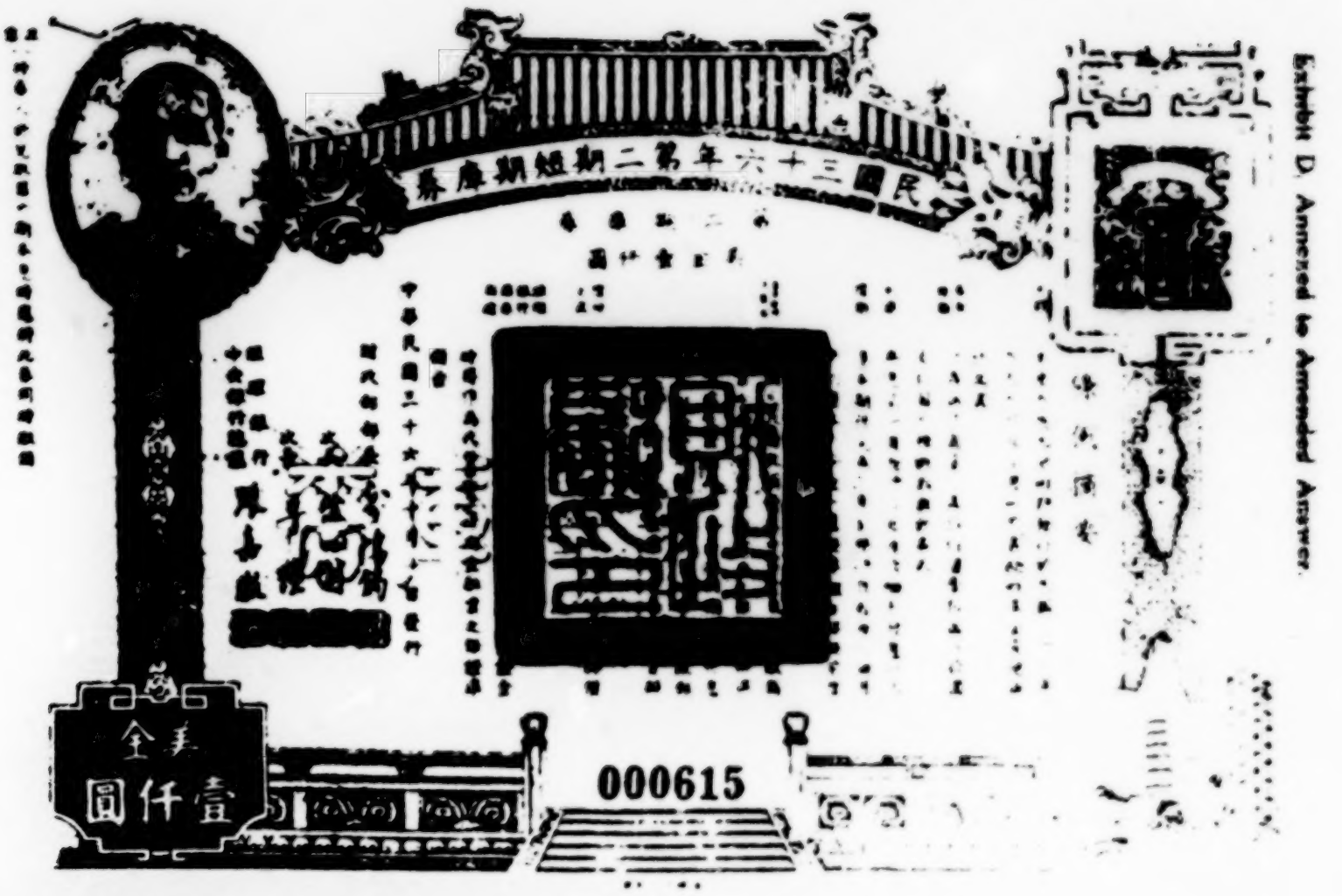
(Sworn to January 22, 1953.)

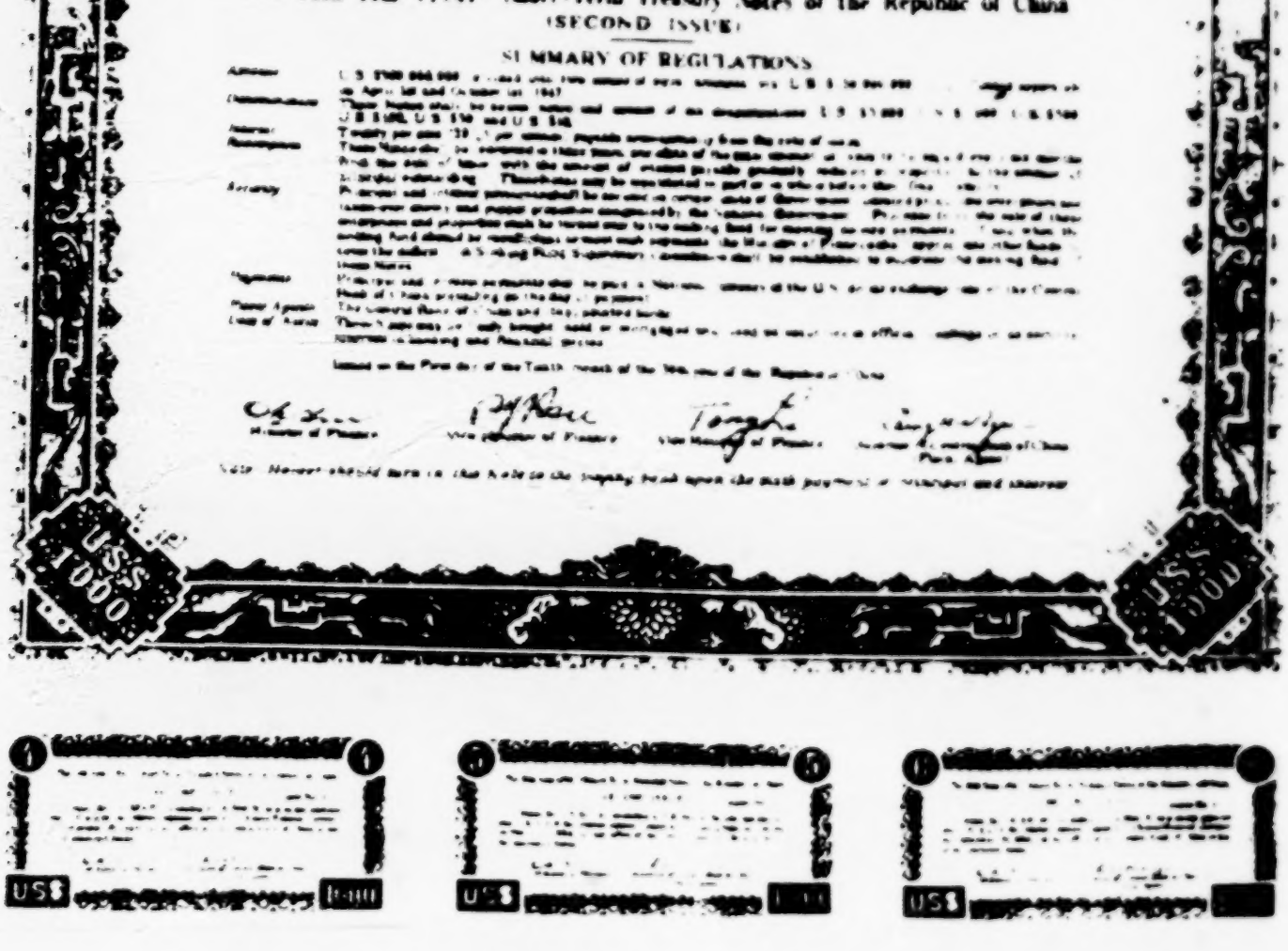
[fol. 54] AFFIDAVIT OF LOUIS J. GUSMANO, READ IN OPPOSITION TO DEFENDANT'S MOTION

STATE OF NEW YORK,
County of New York, ss:

Louis J. Gusmano, being duly sworn, deposes and says:

I am a member of the firm of Kirlin, Campbell & Keating, attorneys for the plaintiff The Republic of China in





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--Cameraman's note

this matter, and I am familiar with all the pleadings and proceedings heretofore had herein.

This affidavit is submitted in opposition to defendant's motion seeking reargument of, and other relief from, the decision of Judge Irving Kaufman rendered on December 22, 1952, dismissing defendant's counterclaims upon motion made by plaintiff The Republic of China. An order and final judgment of dismissal was entered on January 9, 1953. Defendant's present application for alleged relief from said final judgment was made on January 22, 1953.

It is submitted that defendant's contentions in support of the application for reargument have been thoroughly considered by this Court upon its determination of plaintiff's motion to dismiss the counterclaims, at which time this Court determined their lack of merit.

The allegations which defendant for the first time seeks to include in the counterclaims which have been dismissed by final judgment (viz., as to the first counterclaim, that the alleged obligation is supposedly payable, not at defendant's bank in New York, but at The Chase National Bank; and as to the second counterclaim that the alleged obligations, before the seizure of Shanghai by the Communists, were supposedly payable, not at defendant's [fol. 55] bank in New York, but at its office in Shanghai) are not material inasmuch as they do not affect in the slightest this Court's determination that the counterclaims, even with the additional proposed allegations included, are not pleadable against plaintiff The Republic of China, a friendly foreign sovereign, because they are unrelated to the subject matter of plaintiff's suit.

Moreover, defendant's application made one month after the opinion of the Court was rendered and 13 days after entry of final judgment dismissing the counterclaims, must be considered untimely.

Wherefore, it is respectfully prayed that defendant's application be denied in all respects.

Louis J. Gusmano.

(Sworn to February [illegible], 1953.)

In United States District Court

Opinion, Kaufman, J., Denying Defendant's Motion for Reargument and for Leave to Amend Counterclaims, Etc.—February 19, 1953

Irving R. Kaufman, D. J.:

The motion for leave to rea-gue and for leave to amend the counterclaims and for other relief is denied. The opinion in the instant case was filed on December 22, 1952. The order of this Court dismissing the counterclaims was filed on January 9, 1953 and judgment was entered on that date. Regardless of whether Rule 9 (h) of the General [fol. 56] Rules for the Southern District of New York or Rule 59 of the Federal Rules govern the time within which this motion for reargument might be brought, it is clear that this motion is untimely. The motion for leave to amend stands in no better position than the motion for reargument for " . . . the judgment of dismissal should be reopened before an amendment to the complaint [here a counterclaim] is granted. Such relief can be sought within ten days under Federal Rules of Civil Procedure, rule 59, 28 U. S. C. A. . . ." *Markert* v. *Swift & Co.*, 173 F. 2d 517, 519 (C. A. 2, 1949). Moreover, the petitioner has filed an appeal from the judgment, so that this Court now lacks power to grant the relief sought. *Daniels* v. *Goldberg*, 8 F. R. D. 580 (S. D. N. Y. 1948) aff'd 173 F. 2d 911 (C. A. 2, 1949)

Motions denied.

Dated: New York, N. Y., February 19, 1953.

Irving R. Kaufman, U. S. D. J.

[File endorsement omitted.]

[fol. 57] In United States District Court

Order Denying Defendant's Motion for Reargument and for Leave to Amend Counterclaims, Etc.—February 27, 1953

The National City Bank of New York, the defendant herein, having moved for an order granting leave to said defendant to reargue the motion of the plaintiff for dis-

missal of the counterclaims and to vacate the order granting the said motion and judgment entered herein on January 9, 1953, or in the alternative, directing resettlement of the said order and judgment and permitting defendant to amend said counterclaims and each of them and the said defendant having at the same time and place moved for an order granting leave to the said defendant to submit within ten (10) days after the final determination thereof a further amended answer in which should be included amendments to the said counterclaims and to designate each said counterclaim also as a set-off and to include in each certain allegations as to the place and manner of payment of the obligations set forth therein, and for such other amendments as may seem pertinent; and for other and further relief; and after hearing counsel for the respective parties and on the opinion of Honorable Irving R. Kaufman dated February 19, 1953, it is

Ordered that the said motions be, and they hereby are denied.

Dated, New York, N. Y., February 27, 1953.

(Sgd.) Irving R. Kaufman, U. S. D. J.

[fol. 58] In United States District Court

[Title omitted]

Notice of Appeal—Filed March 6, 1953

Sirs:

Notice is hereby given that The National City Bank of New York, defendant herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the order dated February 27, 1953 and entered in this action on February 27, 1953 in the Office of the Clerk of this Court, by which it was ordered that the motion by the defendant, The National City Bank of New York, for an order granting leave to said defendant to reargue the motion of the plaintiff, The Republic of China, for dismissal of the counterclaims and to vacate the order granting the said motion and judgment entered herein on Janu-

ary 9, 1953, or in the alternative, directing resettlement of the said order and judgment and permitting defendant to amend said counterclaims and each of them and also by which it was ordered that the motion for an order granting leave to the said defendant to submit within ten [fol. 59] (10) days after the final determination thereof a further amended answer in which should be included amendments to the said counterclaims and to designate each said counterclaim also as a set-off and to include in each, certain allegations as to the place and manner of payment of the obligations set forth therein, and for such other amendments as may seem pertinent, and for other and further relief, be denied, and that the defendant appeals from each and every part of said order as well as from the whole thereof.

Dated, New York, N. Y., March 6, 1953.

Yours, etc., Sherman & Sterling & Wright. By: (Sgd.) Walter K. Earle, A Member of the Firm, Attorneys for Defendant, The National City Bank of New York, 20 Exchange Place, New York 5, N. Y.

To: Messrs. Kirlin Campbell & Keating, Attorneys for Plaintiff, The Republic of China, 120 Broadway, New York 5, New York.

[fols. 60-61] Designation as to Contents of Record—Filed March 11, 1953

(Omitted in printing)

[fol. 62] Stipulation of Attorneys Approving Record

(Omitted in printing)

[fol. 63] Clerk's Certificate to foregoing transcript omitted in printing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 44—October Term, 1953.

Argued November 10, 1953

Docket No. 22773

THE REPUBLIC OF CHINA,
Plaintiff-Appellee,

and

SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Plaintiffs,

—v.—

THE NATIONAL CITY BANK OF NEW YORK,
Defendant-Appellant.

Before:

SWAN, FRANK and MEDINA, *Circuit Judges.*

KIRLIN CAMPBELL & KEATING (Cletus Keating, Robert E. Kline, Jr., and Louis J. Gusmano, of counsel) *for the Republic of China.*

SHEARMAN & STERLING & WRIGHT (Chauncey B. Garver and W. Harvey Reeves, of counsel) *for The National City Bank of New York.*

Appeal from orders of the United States District Court for the Southern District of New York, Judge Irving R. Kaufman, presiding. Affirmed.

OPINION—December 8th, 1953

FRANK, *Circuit Judge:*

The plaintiffs, the Republic of China (with its National Government now located in Formosa) and others, brought this suit under section 25(b) of the Federal Reserve Act, 12 U. S. C. A. sec. 632, to recover $200,000 which, according to the complaint, was deposited with the defendant bank and which defendant refuses to pay. The complaint alleges that the deposit was made by plaintiff, the Shanghai-Nanking Railway Administration, an agency of The Republic of China, and that the Secretary of State of the United States, pursuant to section 25(b) has certified to defendant that the deposit belongs to the Republic of China. Defendant's amended answer includes not only denials and affirmative defenses but also two counterclaims which Judge Kaufman in his opinion—108 F. Supp. 766—summarized as follows: "The first counterclaim alleges that on or about August 9, 1920, defendant participated in a loan made by J. P. Morgan & Co. to the Pacific Development Co. in the face amount of $5,000,000, said loan being secured by a $5,500,000 Chinese Government Treasury Note, being the Note of the plaintiff herein, The Republic of China. Said loan was not paid on its maturity date by Pacific Development Company and subsequently Pacific Development Company was liquidated. In the course of said liquidation, J. P. Morgan & Co. offered the collateral for sale at public auction and purchased the collateral on behalf of the participants in the loan to the Pacific Development Company. The Chinese Government Treasury Note is still held by J. P. Morgan & Co. and is now past due, and by virtue thereof there is said to be owing to the defendant the sum of $317,720.93 plus

interest of $590,386.53. For a second counterclaim against plaintiff, The Republic of China, the defendant alleges that between April and August 1947 defendant began the purchase of Chinese Government 36th Year Short Term Treasury Notes of The Republic of China. On these notes, the plaintiff, The Republic of China, is said to be indebted to the defendant in the sum of $391,033.60 principal together with interest thereon in the sum of $335,290.94. Defendant demands judgment against the plaintiffs dismissing the complaint with costs, and against the plaintiff, The Republic of China, for the sum of $1,634,432."

Each counterclaim contained this allegation: "The plaintiff, The Republic of China, is, and at all times hereinafter mentioned was, a sovereign government recognized as such by the duly appointed Executive Department of the United States."

The defendant's amended answer also shows the following: Regulations issued by the Republic of China in connection with the 36th Year Short-Term Treasury Notes provided that the "Fiscal Agents" for the payment of those Notes were the Central Bank of China and its "appointed banks"; a branch of defendant in Shanghai, China, was one of these "appoiated banks"; it continued to be such when in 1948, because of a default, the principal of those Notes became payable, and thereafter until the seizure of Shanghai by the People's Government of China in May, 1949.

On the motion of plaintiff, the Republic of China, these counterclaims were dismissed by an order entered January 8, 1953. Some thirteen days later, defendant moved for leave to submit a further amendment of its answer to include amendments of the counterclaims designating each as a "set off" and specifically alleging that defendant's Shanghai branch was one of the banks at which the 36th Year Short-Term Notes were payable. An affidavit accompanying this motion stated that the Treasury Note described in the first

counterclaim was payable at the Chase National Bank, New York. This motion was denied by an order entered February 27, 1953. This appeal is from the orders of January 8 and February 27, 1953. For the purposes of this appeal, we shall consider the counterclaims as if they had been further amended in the manner thus proposed by defendant.

1. As the defendant in each of its counterclaims, specifically alleged that the Republic of China is and was a sovereign government recognized as such by our government, there was no need, in passing on the motion to dismiss, to have a trial to determine that fact.[1] We recently stated, in *Republic of China* v. *American Express Company*, 195 F. (2d) 230 (C. A. 2), that a "friendly, foreign sovereign, recognized by the United States, cannot be sued in the courts of this country without its consent." We went on to say, however, that, when a sovereign sues in our courts to enforce a claim, "it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. * * * Accordingly, we have held that a sovereign who sues in our courts so submits itself to the jurisdiction it has invoked that defenses by way of set-off and of counterclaim are available against it. * * * But the waiver of immunity [2] does not extend beyond, at most, counterclaims which are based upon the subject matter of the suit." We think the trial judge correctly held that the counterclaims here were not based on the subject matter of the suit. We reach the same result

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[1] As Judge Kaufman said: "While this point might be well taken if it were directed to a motion to strike the affirmative defenses, it is wholly inappropriate here for the simple reason that the counterclaims in question are pleaded, not against the Shanghai-Nanking Railway Administration but against The Republic of China itself."

[2] We agree with Judge Kaufman that the "agreement" by "implication" and the "waiver" are fictions used in the interest of achieving justice.

if we regard the counterclaims as but set-offs.[3] For the assertion against a sovereign government of a counterclaim or set-off, unrelated to the claim asserted by the sovereign in its suit, is the equivalent of an independent suit against that sovereign brought without its consent.[4] Wherefore we think the district court's orders were correct.

Defendant has referred us to a letter dated May 19, 1952, from Mr. Tate, Acting Legal Adviser to the State Department, to the Attorney General,[5] calling attention to a so-called "trend" or "shift of policy" on the part of our State Department tending to restrict the sovereign immunity of foreign governments to "governmental" or "public" acts and to exclude "private acts" or "commercial activities." Defendant, as we understand it, does not argue that this new trend, if adopted by our courts, would here serve to deprive plaintiff of its sovereign immunity. Defendant's position seems to be that the alleged new trend indicated in this letter should be further extended judicially so as to validate the counterclaims in the instant case. Assuming, *arguendo*, that this letter could and should affect judicial decisions, we see nothing in it to justify the suggested extension. We have no high regard for the idea that, without its consent, a government may not be sued for acts which, if done by a private person, would be actionable wrongs.[6] But we feel that we must leave to Congress or the

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[3] See *United States* v. *Shaw*, 309 U. S. 495, 503-504, quoting with approval from *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 106, in discussing *The Thekla*, 266 U. S. 328, decided the same day as the *Smelting Works* case.

[4] See *In re Monongahela Rye Liquors*, 141 F. (2d) 864, 869 (C. A. 3). Our disagreement with that decision in *United States* v. *Roth*, 164 F. (2d) 575 (C. A. 2), turned entirely on the recent statutory amendments to the Bankruptcy Act which apparently had not been considered by the Third Circuit.

[5] See 26 Department of State Bulletin (June 23, 1952) 984-985.

[6] Cf. *Wallace* v. *United States*, 142 F. (2d) 240, 243 (C. A. 2).

Supreme Court any marked diminution of that hoary doctrine (although, in the belief of many persons, it is basically immoral).

2. Defendant also relies on Section 147 of the New York Negotiable Instrument Law which provides: "Where the instrument is made payable at a bank it is equivalent to an order of the bank to pay the same for the account of the principal debtor thereon." We think it plain that this provision of the New York statute has no application to the 36th Year Short-Term Treasury Notes, covered by the second counterclaim, since they are payable in China.

The Note referred to in the first counterclaim is not payable at the defendant bank but at another New York bank. We think that fact prevents Section 147 from operating to give rise to a waiver by The Republic of China of its immunity with respect to the first counterclaim. See *United States* v. *New York Trust Co.*, 75 F. Supp. 583, 587; *United States* v. *National City Bank of New York*, 90 F. Supp. 448, 454. We think it irrelevant for this purpose that the defendant has a part interest in any proceeds of the Note.

3. Defendant also contends that it had a so-called "bankers' lien," or right of set-off, based on the Treasury Notes named in the second counterclaim. We think this contention untenable. For the deposit, the subject of this suit, was made with defendant in New York, and continued thereafter to be owing by it in New York, whereas those Treasury Notes, purchased by defendant's Shanghai branch, were there payable. The creation of such a branch bank finds its authorization in Section 25 of the Federal Reserve Act, 12 U. S. C. Sections 601-604, which provides: "Every national banking association operating foreign branches *shall conduct the accounts of each foreign branch independently of the accounts* of other foreign branches estab-

lished by it and *of its home office*,[7] and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item." This provision has been interpreted to mean that a national bank and each of its foreign branches are separate entities, to be treated as if they were unrelated banks with respect to business done between them, and for many other purposes.[8] In *Pan-American Bank & Trust Co.* v. *National City Bank*, 6 F. (2d) 762, 767 (C. A. 2), this court, after quoting Section 25, said: "That is, the branch is not a mere 'teller's window'; it is a separate business entity. * * * But the Rio branch, in so becoming a holder of the drafts, and then sending them to New York for collection, assumed the same relation to its home office that any other bank or person that had similarly negotiated the paper would have assumed. In fact, as the evidence shows, the drafts and accompanying documents went from the Rio branch to the New York home office with a demand for credit; *i.e.*, a demand for payment, and payment by the demanded credit was given the branch. This was just what the cited act of Congress in effect requires, and illustrates the rulings that, in respect of the collection of forwarded paper, branches and a parent bank are to be considered as separate entities. * * * The case presents a legal problem identical with the common one resulting from discount by any indifferent dealer in commercial paper of such a draft as Barcellos', and presentation by such dealer of the draft to the drawee for payment." See also *In re Harris*, 27 F. Supp. 480 (S. D. N. Y.); *Bluebird Undergarment Corporation* v. *Gomez*, 139 Misc. 742, 249 N. Y. S. 319; cf. *Marlborough*

[7] Emphasis added.

[8] See *McGrath* v. *Agency of Chartered Bank of India*, 104 F. Supp. 964, 967-968.

Trust Company v. *Elliot*, 86 F. (2d) 315, 316-317.[9] We think this reasoning leads to the conclusion that defendant had no set-off.

Affirmed.

[9] Cases as to branch banks not governed by a statute like Section 25 are not pertinent. Such cases are *Garnett* v. *M'Kewan*, 8 L. R. Exchequer 10; *Prince* v. *Oriental Bank Corporation*, 3 A. C. 325, cf. *Rex* v. *Lovitt* [1912] A. C. 212.

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE REPUBLIC OF CHINA, Plaintiff-Appellee,

and

SHANGHAI NANKING RAILWAY ADMINISTRATION, MOH HAN, etc., et al., Plaintiffs,

v.

THE NATIONAL CITY BANK OF NEW YORK, Defendant-Appellant

JUDGMENT—December 8th, 1953

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and they hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance wtih this decree.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

(3607)

[fol. 74] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 612

THE NATIONAL CITY BANK OF NEW YORK, Petitioner,

vs.

THE REPUBLIC OF CHINA, et al.

ORDER ALLOWING CERTIORARI—Filed April 26, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Office - Supreme Court, U. S.
FILED
MAR 2 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 30

THE REPUBLIC OF CHINA,

Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,

Defendants,

v.

THE NATIONAL CITY BANK OF NEW YORK,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHAUNCEY B. GARVER
WM. HARVEY REEVES
Counsel for Petitioner

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Of Counsel

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

THE REPUBLIC OF CHINA,

Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,

Defendants,

v.

THE NATIONAL CITY BANK OF NEW YORK,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The National City Bank of New York, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on December 8, 1953, affirming the orders and judgment of the District Court dismissing petitioner's two counterclaims setting forth financial obligations of the respondent, The Republic of China, to petitioner, The National City Bank of New York (hereinafter referred to as "City Bank").

Opinions Below

The opinion of the District Court for the Southern District of New York granting plaintiff's motion to dismiss the counterclaims (R. 35) is reported in 108 F. Supp. 766. The opinion of the District Court denying defendants' motion for reargument and for leave to amend the counterclaims (R. 55) is reported in 14 F. R. D. 186. The opinion of the Court of Appeals (R. 64) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 8, 1953 (R. 64). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251(1).

Question Presented

The question presented is the extent to which a friendly foreign sovereign, which brings suit in the courts of the United States against an American corporation to recover a debt, is entitled to immunity from the assertion against it by the defendant of counterclaims based on debts owing to the defendant by the sovereign.

The word "counterclaim" as here used is limited in scope to the reduction or cancellation of the claim asserted by the plaintiff, by way of set-off or equitable defense. Counterclaims against sovereigns, when permitted, have always been so limited,[1] as distinguished from counterclaims against private persons, which may support affirmative judgments. The petitioner has not sought a judgment against the sovereign, The Republic of China, enforceable beyond the amount of the sovereign's claim against it, although the sovereign owes the petitioner far more than the amount demanded in the complaint.

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[1] *French Republic* v. *Inland Nav. Co. et al.*, 263 F. 410, 412; *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 F. 341, 343; 24 R. C. L. 811.

Owing to the manner in which this case came to the Court of Appeals for the Second Circuit, whose judgment this Court is now asked to review, the issues have been reduced to a limited and definite compass. By granting respondent's motion to dismiss the counterclaims in a suit by The Republic of China against the City Bank to collect a debt, the District Court, as affirmed by the Court of Appeals, denied to the petitioner the right to plead financial obligations of the respondent owing to it for the purpose of reducing or cancelling the respondent's recovery (R. 35, 41, 64 *et seq.*, 68).

Although the District Court had denied the motion by petitioner to amend the counterclaims, the Court of Appeals, for the purpose of this appeal, treated the counterclaims as, in fact, amended (R. 67). For all purposes here, the allegations of both parties are to be treated as admitted. Therefore, the only question presented is the legal propriety of permitting The Republic of China, a sovereign, to continue its efforts to enforce a debt (a deposit account) owing to it by the City Bank without regard to its own much larger unpaid obligations to the City Bank, which are not otherwise collectible, since the Bank cannot sue the sovereign.

The Court of Appeals agreed with the District Court in its application of the law to the counterclaims (even assuming them to have been amended) which, in brief, was that The Republic of China, because of its sovereignty, was immune from any reduction by these counterclaims of its expected recovery from the City Bank. It held that a counterclaim, such as these, "is the equivalent of an independent suit against that sovereign brought without its consent" (R. 68). But, in so interpreting the law, the Court of Appeals took occasion to say: "We have no high regard for the idea that, without its consent, a government may not be sued for acts which, if done by a private person, would be actionable wrongs. But we feel we must leave to Congress or the Supreme Court any marked diminution of that hoary doctrine (although, in

the belief of many persons, it is basically immoral)" (R. 68).

The issue which this Court is asked to review is simply whether, in a situation such as set forth in the record, the petitioner, an American bank, shall or shall not be required to pay its debt to the sovereign notwithstanding unpaid debts of the sovereign owing to it, thus increasing its already substantial loss, and, obversely, whether the sovereign government shall or shall not be allowed to repudiate in full its own indebtedness to the defendant, instead of satisfying it in part, out of its recovery in the action.

Petitioner denies that the law properly applicable required the results reached by the courts below. A counterclaim (set-off) against a sovereign is not limited to the narrow definitions laid down by those courts. If any rules of law with respect to sovereign immunity exist as found and applied by the lower courts, they are obsolete and should be so declared by this Court. Moreover, even if the restrictive principles referred to by the lower courts are adhered to, the counterclaims here pleaded are well within recognized exceptions to the doctrine of sovereign immunity.

The question relating to the extent of sovereign immunity and the circumstances under which counterclaims may be pleaded against a sovereign voluntarily suing in our courts, as they arise in this case, may be summarized in the following questions:

1. Does a foreign sovereign voluntarily entering our courts to collect a debt against an American corporation waive its immunity for contract obligations which this sovereign owes to that corporation, to the extent of its expected recovery from that corporation?

2. Should any counterclaim (set-off) based upon the contract obligation of a foreign sovereign, pleaded against it in diminution of or to prevent the recovery by that

sovereign, be considered as an independent suit against the sovereign?

3. Where a foreign sovereign suing in our courts has had business relations over many years with an American Bank, from which it is endeavoring to collect a debt, may contract obligations of the sovereign to the defendant Bank, voluntarily incurred for full value in the course of these dealings by the sovereign, be considered as part of the "subject matter of the suit"?

4. When a foreign sovereign has commenced suit in our courts to recover a debt from an American corporation, and the sovereign owes that American corporation debts in equal or greater amount, may these debts be pleaded as counterclaims (set-offs) notwithstanding that they do not arise out of the "subject matter of the opposing party's claim" as that phrase is defined in Rule 13 of the Federal Rules of Civil Procedure?

Statutes Involved

The pertinent statutory provisions are printed in the Appendix, *infra*, p. 19.

Statement

The pleadings set forth three contracts between the parties: the complaint and the two counterclaims (R. 4-7; 23, 25). The action of The Republic of China is to collect from the City Bank a bank account, which was established in New York by transfer of $200,000 from Shanghai, China, in 1948 (R. 13), the very year in which the petitioner advanced funds in Shanghai, China, to the respondent. These advances in the years 1947 and 1948, larger in amount than the bank account, remain unpaid (R. 25) (*post*, p. 6).

The first counterclaim sets forth the following dealings between the parties: In 1920, the City Bank participated in a $5,000,000 loan to the Pacific Development Company,

which was secured by a Chinese Government Treasury Note in the face amount of $5,500,000. This Note was the direct obligation of The Republic of China, respondent here. The loan was not paid at its maturity and, upon the liquidation of the Pacific Development Company, the Note was, in 1928, purchased for the account of the interested banks and the said obligation payable at one of the member banks of the loaning syndicate has since been held by another of them for the benefit of all. The City Bank has a participating interest in the amount of $317,720.93 with interest thereon, no part of which has been paid. The City Bank's interest in this Note was known to The Republic of China, which recognized its indebtedness thereon to the Bank (R. 23, 24, 46, 47, 52).

The second counterclaim sets forth the following dealings between the parties: Between April 1947 and March 1948, the City Bank, through its Shanghai Branch, purchased Chinese Government 36th Year short-term Treasury Notes (commemorative of the 36th year of the establishment of The Republic) under which The Republic of China, respondent, agreed to pay the face amount of each note within three years, with redemptions every six months. Each was by its terms payable in national currency at the U. S. dollar exchange rate of the Central Bank of China prevailing on the respective days of payment and each was payable at the Central Bank of China or at any of its appointed banks, among which were the Shanghai and other eastern branches of the City Bank. Some of these obligations were paid, but there remains the unpaid amount equal to the sum of $391,033.60 for which The Republic of China is indebted to the City Bank, with interest (R. 25, 26, 46, 53).

Proceedings in District Court

This action was commenced in the United States District Court for the Southern District of New York on the 2nd day of May, 1951. The Bank had received adverse claims to the bank account which the respondent sought

to collect from it and, for its protection, invoked procedures provided by § 51-a of the Civil Practice Act of the State of New York, used where interpleader is not possible because of lack of jurisdiction of the adverse claimant.

Because of the procedures relating to adverse claimants, it was not until July 11, 1952, that the defendant served an amended answer (R. 11). The Republic of China thereupon, on September 15, 1952 (R. 34), made a motion in the District Court pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the counterclaims on the grounds:

> "1. That the Court lacks jurisdiction thereof because plaintiff The Republic of China is a friendly sovereign which has not consented to be sued on the matters therein alleged.
>
> 2. That they fail to state claims against plaintiff The Republic of China upon which relief can be granted."

On December 22, 1952, Hon. Irving R. Kaufman, District Judge for the Southern District of New York, granted the plaintiff's motion to dismiss the counterclaims and in the opinion (R. 38), construing the phrase "subject matter of the suit", held the two counterclaims were not within that term, as defined, and the sovereign had not waived its immunity, citing the cases of *United States* v. *New York Trust Co.*, D. C. S. D. N. Y., 1946, 75 F. Supp. 583, and *Republic of China* v. *American Express Co.*, 2 Cir., 1952, 195 F. 2d 230, 233. The court found no other reason to permit counterclaim or set-off here.

Opinion of the Court of Appeals

On December 8, 1953, Judge Frank, writing for the Court of Appeals for the Second Circuit, in a unanimous decision, affirmed Judge Kaufman's decision and judgment on the authority of *Republic of China* v. *American Express Co.* (*supra*) in which that very court had granted

a counterclaim of interpleader, holding that interpleader for adverse claimants was a proper counterclaim, based upon the subject matter of the suit. In support of his contention that the counterclaims here are equivalent to an independent suit against the sovereign without its consent, the court cited *In re Monongahela Rye Liquors*, 141 F. 2d 864, 869 (C. A. 3).

The Court of Appeals also held *arguendo* that, even if a certain letter by the Acting Legal Adviser of the State Department indicated a "trend" or "shift" in policy tending to restrict sovereign immunity of foreign governments to "governmental" or "public" acts, and to exclude from this protection "private" acts or "commercial activities" this would not cause the Court to reverse the lower court's decision dismissing the counterclaims and that the Court was without power to change these concepts of sovereign immunity, any diminution of which it must leave to Congress or the Supreme Court.

The petitioner had presented in argument that the obligations pleaded in both counterclaims were payable at the petitioner bank and that, therefore, under decided cases and pursuant to § 147 of the Negotiable Instruments Law of the State of New York, should be considered as a direction to make payment to the extent of the bank account sought. In neither case did the court find that the counterclaims were payable at the office of The National City Bank of New York. As to the first, the court held that the obligation was not payable at the petitioner's office and that it was "irrelevant for this purpose that the defendant had a part interest in any proceeds of the note" (R. 69) which, as the record shows, was held by one member of the loaning syndicate, and was payable at another member of this same syndicate in New York (R. 24, 52, 53, 54). The finding as to the second was based on an interpretation of Section 25 of the Federal Reserve Act, 12 U. S. C. §§ 601, 604, relating to the operating of foreign branches by an American bank, and on the cases of *Pan-American Bank & Trust Co.* v. *National City Bank*, 6

F. 2d 762, 767 (C. A. 2), with further reference to *In re Harris*, 27 F. Supp. 480 (S. D. N. Y.), *Bluebird Undergarment Corporation* v. *Gomez*, 139 Misc. 742, 249 N. Y. Supp. 319, *Marlboro Trust Company* v. *Elliott*, 86 F. 2d 315, 316-317.

Neither the lower court nor the Court of Appeals went so far as to assert that sovereign immunity is a bar to every counterclaim, but restricted those permitted by saying that "counterclaims may not be asserted against a friendly foreign sovereign unless they are based on the subject matter of the suit" (R. 38). The courts below considered the phrase "subject matter of the suit" not as an equitable matter but narrowly and limited to, if not wholly synonymous with, "compulsory counterclaims" as that phrase is defined in Rule 13 of the Federal Rules of Civil Procedure. However, in justification for permitting any counterclaim whatever, in spite of an assertion of sovereign immunity, the District Court reverted to equitable considerations, saying at page 767:

> ". . . When the counterclaim is based on the same subject matter the court may say that the sovereign 'has waived immunity' or 'consented to suit'. These are legal fictions based on the notion that it would be exceedingly inequitable to allow any plaintiff to function as a normal litigant when it is to its advantage to do so, but to raise the shield of sovereign immunity with respect to the same matter, when the tides are turned against it . . ." (R. 38).

But, if this rule be based upon equitable considerations, as indeed it must be, then petitioner fails to see the distinction made by the District Court and affirmed by the Court of Appeals which permitted the sovereign "to raise the shield of sovereign immunity . . . when the tides are turned against it" by reason of petitioner's demand for an offset of debts it owes, but desires to avoid. If recourse must be had to legal fictions in order to imply consent by the sovereign, when equity so demands, then the legal fictions should be invoked to import consent by the

sovereign in this case. Lack of express consent should not protect a sovereign in unconscionable repudiation of it debts to the petitioner while using our courts to enforce a debt, to the further damage of the petitioner.

Specification of Errors to Be Urged

The Circuit Court of Appeals erred (1) in holding that a right of counterclaim (set-off) against a foreign sovereign is limited to the "subject matter of the suit"; (2) in holding that the counterclaims here were not based on the "subject matter of the suit"; (3) in holding that the first counterclaim should not be considered, as a matter of law, "payable at the office of the City Bank"; (4) in holding that the second counterclaim, as a matter of law, should not be considered as "payable at the office of the City Bank"; (5) in defining the phrase "subject matter of the suit" and similar phrases as the basis for inclusion or exclusion of any particular counterclaim as against a sovereign, as of no greater scope than the phrase "subject matter of the opposing party's claim" as used for other purposes in Rule 13 of the Federal Rules of Civil Procedure; and (6) in holding that the announced policy of the State Department in dealing with friendly foreign sovereigns as voluntary litigants in our courts, viz. it had abandoned the classical or "virtual absolute theory of sovereign immunity" and "adopted a restrictive theory of sovereign immunity", did not prevent the dismissal of the counterclaims here.

Reasons for Granting the Writ

The questions presented by this case have fundamental and far-reaching effects upon the present position of the United States in relation to other countries in the world. Their significance may conveniently be grouped under three general considerations:

(1) The authoritative analysis of the rights of a friendly foreign sovereign as a litigant in our courts

is essential to sound and friendly international relations. The concept of sovereignty has peculiar significance at this time, and because of this country's dominant political status in the world and its position as the greatest creditor nation, this Court, by its decision, may well determine that the vast governmental obligations now being assumed throughout the world will not be lightly repudiated.

(2) A decision of this Court is necessary because a state of confusion now exists in this field of the law. This confusion should be resolved for the better administration of justice where friendly foreign sovereigns are before our courts.

(3) A further reason for determination by this Court lies in the disjuncture between judicial interpretation of sovereign rights and the executive determination of what these should be in its foreign relations. Here the State Department has made a very complete and liberal statement of its position[1] and the Court of Appeals has recognized that this position has not been reflected in judicial decisions. Whether or not it should be, the Court of Appeals has said should be left to Congress or the Supreme Court. This Court is the proper forum to make those decisions, because the matter relates to judicial determination of the rights of friendly foreign sovereigns. Since the inception of the Republic such determination has been the prerogative of this Court.

There are other questions of importance in this case, but they are collateral and of less significance than the main issue relating to the attributes of sovereignty. However, it is hoped that, should this Court review the decision of the Court of Appeals, as here requested, it may take occasion to eliminate the doubts created by the opinion of the Court of Appeals as to the relation, under the Federal Reserve Act, of a branch of a national bank to its head office.

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[1] Letter from Acting Legal Adviser Jack B. Tate, dated May 19, 1952, to Acting Attorney General Philip B. Perlman (XXVI, Dept. of State Bull., pp. 984-985 (June 23, 1952)). Appendix D, *post*, p. 20.

Amplifying the first of the three considerations listed above, it should be observed that, at an early time in the history of the United States, this Court had occasion to deal with the question of property seized by a citizen and claimed by a friendly foreign sovereign.[1] Chief Justice Marshall at that time (1812) found no reliable precedent and drew, as he said, his postulates from general principles, and based his conclusions on the situation of the United States in relation to other countries of the world at that time. He determined that the sovereigns of the world, though of equal independence,

> ". . . whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, . . . have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers" (p. 136).

The position of friendly foreign sovereign litigants should now be reviewed using these same basic principles, because conditions since that early date have so radically changed. In 1812 the United States had just begun its expansion westward from the Atlantic shore. It was politically weak; it was economically poor. Its military might was negligible, and it was a newcomer in the family of nations. It needed recognition of its rights as a nation. It required vast foreign investments for the development of its resources. It needed to avoid continental wars. One hundred and forty years have changed the circumstances and with it the functions and definition of sovereignty. Economic thinking is no longer *laissez-faire*. The United States no longer is dependent upon foreign capital for its development (although foreign investment is still welcome). It has itself become the greatest lending country in the world, and both from our Government

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[1] *The Schooner Exchange* v. *M'Fadden and Others*, 7 Cranch 116.

and from individuals, friendly foreign governments have borrowed for their economic development.

The United States stands with vast potential powers as to other countries but with no hegemony over the territory of any other. It is in a position to determine by its leadership and example the degree of responsibility which should be assumed by sovereigns voluntarily if they will, imposed on them if necessary, in those economic aspects involving the welfare of its people. The nexus between a decision in this case, and problems yet to arise under the Point IV program, is obvious.

The authoritative determination of this whole doctrine is made more necessary by our second reason for the granting of a writ, which is the confusion that now exists in legal concept, with the result that courts are not always sure to give consistent opinions and have, while giving lip service to some of the old doctrines, nevertheless, in the interests of equity and justice, found exceptions. The obvious and direct injustices resulting from absolute sovereign immunity have been consistently criticized by commentators[1] and from the bench.[2]

For example, in 1946, Mr. Justice Frankfurter, dissenting in *Kennecott Copper Corporation* v. *State Tax Commissioner*, 327 U. S. 573, 580, 581, said:

> "Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. 'It is,' wrote Lincoln in his First Annual Mes-

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[1] Paley, "Moral and Political Philosophy"; Laski, "The Responsibility of the State in England", 32 Har. L. Rev. 447 (1919); Borchard, "Government Liability in Tort", 34 Yale L. Jr. 1, 129, 229; 36 Yale L. Jr. 1, 757, 1039; Pugh "Doctrine of Sovereign Immunity", 13 La. L. Rev. 476.

[2] Mr. Justice Wilson in *Chisholm, Executor* v. *Georgia*, 2 Dall. 419, 471, 472, Judge Frank in *Wallace* v. *United States*, 142 F. 2d 240, 243 (C. A. 2).

> sage, 'as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.' 7 Richardson, Messages and Papers of the Presidents, 3245, 3252. Both the United States and the States are immune from suit unless they agree to be sued. Though this immunity from suit without consent is embodied in the Constitution, it is an *anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility* of the State. (Italics supplied.)
>
> "Not so long ago this Court acted on the realization that 'the present climate of opinion . . . has brought governmental immunity from suit into disfavor.' *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391. . . ."

And, in the case of *United States* v. *Shaw*, 309 U. S. 495, 501 the Court hit at this vestigial remnant of monarchical government. Mr. Justice Reed writing for the Court said:

> ". . . A sense of justice has brought a progressive relaxation by legislative enactment of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen . . ."

Congress has recognized that a doctrine of immunity is indeed antipathetical to a democratic society and, by various enactments and through the approval of international agreements, has purposefully deprived our Government of immunity in most fields of law, wherever a private party might be exposed to liability.[1]

Since the present case does not envisage the sovereign as a defendant or the subjection of a sovereign's property to seizure, the problem may be confined solely to situations where the sovereign has voluntarily entered the courts of

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[1] See the Federal Tort Claims Act of 1946, 60 Stat. 843, 28 U. S. C. § 1346(b) (1949).

the United States as a litigant, a subject which this Court had occasion to consider in 1937 and, after observing the general proposition, stated[1] by Mr. Justice Stone:

> ". . . But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. See *The Sapphire*, 11 Wall. 164, 167; *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255; 139 N. E. 259. By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. . . ."

Salutary as this pronouncement was, it would appear that it now needs further emphasis as well as amplification by this Court to become a rule of decision in the lower Federal and in the State courts of our country, for, if this Court intended the principle to be broadly followed, other courts have not so construed it. The doctrine permitting counterclaims, it is believed, should not only be applied here, but by the pronouncement of this Court, should become universally accepted.

In matters of admiralty, this progression is already well apparent as, for example, in *The Gloria, The Thekla, The F. J. Luckenbach, Kingdom of Norway* v. *Federal Sugar Refining Co.*, 286 Fed. 188, at page 194, the court said:

> "There is no principle of public law exempting a sovereign state from its obligations under the law. It should not be assumed that a state desires to deny or evade its obligations. There may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state. But, once the state has chosen its forum, there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice."

Other courts have felt as strongly in commercial actions such as in the above mentioned case involving shipping.

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[1] *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134.

We quote the language of the opinion in the case of *State of Russia* v. *Bankers Trust Co.*, 4 F. Supp. 417, 420, in which the District Court said:

> "The plaintiff urges its sovereignty as a bar to offsetting the notes against its claim for the credit balance, on the ground that the two causes of action are entirely unconnected. Assuming for the moment that there is no one else interested in the result, it would seem to me inequitable to direct the defendant to pay its debt to the plaintiff when there is a counter debt of far larger amount justly due to the defendant for which it has no remedy. The plaintiff's sovereignty protects it from independent suit, and, furthermore, its property in this country amounts to only a very small part of its indebtedness here, so that, if the offset is barred, the defendant has no remedy whatever. It would be a little too much like tying a defendant hand and foot and letting a plaintiff go through his pockets, and the fact that the plaintiff is a sovereign state does not completely satisfy the moral sense. Concededly the sovereignty of the plaintiff would not protect it from an offset arising out of the same transaction, and it is impossible for me to distinguish the two situations on principles of justice apart from legalisms. In neither case is the defendant obliged in good conscience to pay what the plaintiff demands, even though the law for its own purposes analyzes the relations into a debt owed by the defendant and a counter debt owed to it. This separation may have importance when the rights of third parties intervene or where the defendant has an adequate remedy apart from an offset; but, in the absence of those circumstances, a decree directing the defendant to pay would be shocking to the moral sense, even though the plaintiff is a sovereign state."

And like considerations may be found in the case of *French Republic* v. *Inland Nav. Co.*, *supra*, p. 2n.

It is, therefore, the time for this Court to sweep away those curious concepts which support an outmoded and confused theory of sovereignty, and lay down principles which in succeeding cases may be consistently followed.

The third consideration may be stated very briefly,

namely, that political relations between the United States and other sovereigns are changing. This change has been set forth in detail in the letter from the Acting Legal Adviser of the State Department,[1] in which he succinctly points out that there are two lines of definition of the theory of sovereignty and indicates that the United States will hereafter recognize the restrictive and not the absolute. In so stating the policy for the United States, he pointed out that most of our allies adhere to or are tending towards this restrictive theory, and only those with a different philosophy as to private property have continued the full acceptance of the absolute theory. The State Department is careful to point out that this shift of policy by the Executive Branch cannot control the courts, but, as the granting of sovereign immunity to a foreign litigant is to a large extent a matter of proper relations within the family of nations, this shift of policy is clearly a reason why this Court should reconsider the position of a friendly foreign sovereign as a litigant.

In deciding these momentous questions, the Court will determine the jurisdiction of the District and Circuit Courts, for here the District Court declined jurisdiction of the counterclaims of the defendant, but continues to entertain the suit against it. Clearly, in such a case justice, as known, between private persons, cannot be done, although there is complete privity between the parties involved.

The case is not an isolated one. This very sovereign has, within the past few years, commenced six cases against American Corporations, three of them against this petitioner.[2] Other demands and claims are pending;

[1] Letter from Acting Legal Adviser Jack B. Tate, *post*, p. 20.

[2] *Republic of China* v. *American Express Co.*, 195 F. 2d 230; *Bank of China* v. *Wells Fargo Bank & Union Trust Co.*, 190 F. 2d 1010; *Chase Nat. Bank of City of N. Y.* v. *Directorate General of Postal Remittances & Savings Bank et al.*, 112 N. Y. S. 2d 14; *Republic of China (Postal Remittances)* v. *The National City Bank*, D. C. S. D. N. Y. Docket No. 78-288; *Republic of China* v. *The National City Bank*, D. C. S. D. N. Y. Docket No. 79-23.

and, as governments become more and more concerned with the economic life of their nation, more frequently will they appear as litigants. The problems here presented are, therefore, recurring ones which are sure to arise in increasing numbers. An authoritative definition by this Court is required to protect all who do business with a foreign government and to maintain the significance of American justice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari be granted.

Respectfully submitted,

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March 1, 1954.

APPENDIX A

Section 25 of the Federal Reserve Act, 12 U. S. C. Section 604.

"Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item. Dec. 23, 1913, c. 6, § 25, 38 Stat. 273; Sept. 7, 1916, c. 461, 39 Stat. 755."

APPENDIX B

Section 147 of the New York Negotiable Instruments Law.

"Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

APPENDIX C

Rule 13(a) of the Federal Rules of Civil Procedure.

"(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, effective March 19, 1948."

APPENDIX D

Letter from Acting Legal Adviser Jack B. Tate, dated May 19, 1952, to Acting Attorney General Philip B. Perlman (XXVI, Department of State Bulletin, pp. 984-985 (June 23, 1952)).

My dear Mr. Attorney General:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the

United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and

of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries

in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy.

Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE
Acting Legal Adviser

Brief for the Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 30

THE NATIONAL CITY BANK OF NEW YORK,
Petitioner,

v.

THE REPUBLIC OF CHINA,
Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Plaintiffs.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 30

THE NATIONAL CITY BANK OF NEW YORK,
Petitioner,

v.

THE REPUBLIC OF CHINA,
Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Plaintiffs.

BRIEF FOR PETITIONER, THE NATIONAL CITY BANK OF NEW YORK, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below

The opinion of the District Court for the Southern District of New York granting the motion by The Republic of China to dismiss two counterclaims (R. 35) is reported in 108 F. Supp. 766. The opinion of the District Court denying defendant's motion for reargument and for leave to amend the counterclaims (R. 55) is reported in 14 F. R. D. 186. The opinion of the Court of Appeals (R. 64) affirming the District Court, is reported at 208 F. 2d 627.

Jurisdiction

The judgment of the Court of Appeals was entered on December 8, 1953 (R. 71). The defendant's petition for a writ of certiorari was filed March 2, 1954, and was granted April 26, 1954 (R. 72). The jurisdiction of this Court rests on 28 U. S. C., Section 1251 (1).

Statutes Involved

The statutes cited or relied upon, relevant to this case are: (1) Section 25 (b) of the Federal Reserve Act (Title 12, U. S. C., Section 632); (2) Section 25 of the Federal Reserve Act (Title 12, U. S. C., Section 604); (3) Section 147 of the New York Negotiable Instruments Law; (4) Rule 13 of the Federal Rules of Civil Procedure.

The pertinent texts are set forth in Appendix A, *infra*, page i.

Question Presented

The question presented is the extent to which a foreign government which institutes an action in the courts of the United States against an American corporation to recover a debt may rely on the doctrine of "sovereign immunity" to avoid a defense to the action, asserted by way of counterclaim, based on a debt owed by it to the defendant. To take the precise situation which exists in this case is: Can a foreign government which has borrowed money from an American bank and is in default on the loan sue the bank for the balance in a deposit account and recover a judgment for the entire balance, regardless of its indebtedness to the bank?

Statement

On December 21, 1948, The National City Bank of New York, the defendant herein (hereinafter referred to as "City Bank"), received at its head office in New York City from its Shanghai Branch $200,000 to create a new account in the name of the Shanghai-Nanking Railway Administration (R. 13). Thereafter demands for payment of this account were made upon the City Bank by several persons, some of whom are not parties to the action. The City Bank refused to comply with any of these demands (R. 14-16).

This action was commenced on May 2, 1951 to recover the balance of $200,000 in the said account (R. 3). The plaintiff, The Republic of China, alleged that the Shanghai-Nanking Railway Administration was an agency of the Ministry of Communications of The Republic of China and that the individual plaintiffs were officials of such agency (R. 4). In view of the adverse claims which had been presented to the City Bank with respect to the account, the defendant invoked § 51-a of the Civil Practice Act of the State of New York, a procedure provided as protection against adverse claimants where interpleader is not possible because of lack of jurisdiction of the adverse claimants, and obtained a stay of the action until June 30, 1952, for the purpose of permitting adverse claimants to come in.

On July 11, 1952 the City Bank served its amended answer, containing denials and affirmative defenses and also two counterclaims asserted to defeat the action of the plaintiff, The Republic of China (R. 11).

The first counterclaim (R. 23) alleges that, in 1920, the City Bank participated in a $5,000,000 loan to the Pacific Development Company which was secured by a $5,500,000

Chinese Government Treasury Note. This note was the direct obligation of The Republic of China, respondent here, and was payable in New York at one of the member banks of the loaning syndicate. The loan was not paid on its maturity date and upon the liquidation of the Pacific Development Company in 1928 the note was reduced to possession by J. P. Morgan & Co. on behalf of the banks which participated in the loan, by the purchase and sale of this obligation at public auction. This note of the plaintiff is now held by one of the member banks of the syndicate for the benefit of all. The City Bank has a participating interest in the amount of $317,720.93 plus interest, no part of which has been paid, although this indebtedness has been recognized by The Republic of China.

The second counterclaim (R. 25) alleges that, in 1947 and 1948, the City Bank made further loans to The Republic of China by means of the purchase of Chinese Government 36th Year short-term Treasury Notes (commemorative of the 36th Year of the establishment of the Republic). These Notes were purchased through the Shanghai Branch of the City Bank and were payable at the Central Bank of China or at any of its appointed banks, among which were the Shanghai and other Far Eastern branches of the City Bank (R. 32). Some of these obligations were paid, but there remains the unpaid amount equal to the sum of $391,033.60, with interest, for which The Republic of China is indebted to the City Bank.

On September 15, 1952, The Republic of China moved (R. 34) pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the counterclaims on the grounds:

"1. That the Court lacks jurisdiction thereof because plaintiff The Republic of China is a friendly sovereign which has not consented to be sued on the matters therein alleged.

"2. That they fail to state claims against plaintiff The Republic of China upon which relief can be granted."

On December 22, 1952, Hon. Irving R. Kaufman, District Judge for the Southern District of New York, granted the motion to dismiss the counterclaims (R. 41). The court said (R. 38): "it is well settled that counterclaims may not be asserted against a friendly foreign sovereign unless they are based on the subject matter of the suit", and held that the counterclaims here did not "arise out of the same subject matter covered in the complaint", citing *United States* v. *New York Trust Co.*, 75 F. Supp. 583 (D. C. S. D. N. Y. 1946); and *Republic of China* v. *American Express Co.*, 195 F. 2d 230, 233 (C. A. 2, 1952).

On January 22, 1953, the City Bank moved (R. 46) for reargument and for leave to amend the counterclaims in order to indicate clearly that the counterclaims were not intended to achieve affirmative relief against The Republic of China, but merely to defeat the plaintiff's efforts to compel the defendant bank to pay $200,000 to it, and that all the Chinese Treasury Notes in both counterclaims were payable at the City Bank within the meaning of § 147 of the New York Negotiable Instruments Law. This motion was denied (R. 55).

An appeal was taken to the Court of Appeals for the Second Circuit, which affirmed the orders of the District Court by judgment entered December 8, 1953 (R. 71). Judge Frank, in delivering the opinion, stated that, for the purpose of the appeal, the court considered the counterclaims as if they had been amended in the manner proposed by the defendant in its motion for leave to amend (R. 67). In expressing his reasons for affirming the decision of the lower court, he said (R. 67-8):

". . . We think the trial judge correctly held that

the counterclaims here were not based on the subject matter of the suit. We reach the same result if we regard the counterclaims as but set-offs. For the assertion against a sovereign government of a counterclaim or set-off, unrelated to the claim asserted by the sovereign in its suit, is the equivalent of an independent suit against that sovereign brought without its consent. Wherefore we think the district court's orders were correct." (Citing *In re Monongahela Rye Liquors*, 141 F. 2d 864, 869 (C. A. 3).)

He added significantly (R. 68):

". . . We have no high regard for the idea that, without its consent, a government may not be sued for acts which, if done by a private person, would be actionable wrongs. But we feel that we must leave to Congress or the Supreme Court any marked diminution of that hoary doctrine (although, in the belief of many persons, it is basically immoral)."

Summary of Argument

The Republic of China owes the City Bank more than $700,000, plus interest. It has brought this action to recover a $200,000 bank account held by City Bank in the name of The Shanghai-Nanking Railway Administration. In its amended answer to the complaint, City Bank set forth two counterclaims based on the large indebtedness to it from The Republic of China. Although this indebtedness far exceeds the amount claimed by The Republic of China, the City Bank does not seek any affirmative relief, but desires merely to defeat plaintiff's action.

The court below pointed out, as other courts have done, that, because of comity and international goodwill, a friendly foreign sovereign may not be sued in our courts without its consent. But when a sovereign voluntarily

comes into our courts seeking their aid in a controversy against a person or domestic corporation of this country, the sovereign impliedly waives its immunity and consents to the imposition against it of defenses, set-offs, counterclaims and other forms of pleading available to the defendant, as though the sovereign were a private litigant. Courts have always been careful to say, however, that this consent of the sovereign is "implied". This is the important word, for it is the law which creates the consent and not an affirmative expression of consent by the foreign sovereign itself. So the law determines consent—"implied" consent—of the sovereign where it finds this to be required by equity and justice and, of course, such consent is found even though the sovereign in any particular case may affirmatively object.

Some lower Federal courts, however, have put a limitation on the type of counterclaim which is permitted against a foreign sovereign. Those lower courts state that only counterclaims which arise out of the subject matter of the action may be imposed against a sovereign without its express consent. As authority for such a limitation those courts have relied upon several decisions of this Court. It is submitted that these Supreme Court decisions in no way stand for the proposition for which they are cited. To the contrary, a more reasonable interpretation would indicate that they represent, in the first instance, a remission from the ancient and rigid rule of sovereign immunity. Some of these Supreme Court cases dealt with situations where to exclude a counterclaim which was immediately, obviously and necessarily connected with, and growing out of, the same transaction which the plaintiff sued upon, such as is found in admiralty actions for example, would so shock the conscience of the Court that it naturally assumed that the sovereign involved had consented to have such a counterclaim considered. Thus, these decisions are in reality a withdrawal from the doctrine of sovereign immunity. They expose

the sovereign to liability where before none was permitted. They do not even by implication indicate any limitation imposed on the scope of a counterclaim to be permitted against a foreign sovereign. They should be considered as favoring consideration of all equitable matters existing between the parties; and the categories of counterclaims permitted against a foreign sovereign should, as equity may require, be enlarged.

The decisions of the lower courts in this case excluding the counterclaims are wholly empirical or, at best, based upon decisions of other courts which have made this same erroneous interpretation. There is absolutely no authoritative precedent for such a limitation on the kind of counterclaim which may be pleaded against a foreign sovereign. This Court has never made any pronouncement on the subject. There is no reason, either as a matter of comity or public policy, why a defendant, when sued in our courts by a foreign government, should be so restricted in the methods he may use to defend himself. If the defendant may not in any event obtain an affirmative judgment against the sovereign, without its consent, there is no danger of interference with essential governmental activities by permitting counterclaims of wide scope against the sovereign; and the fact that it is the sovereign itself which has brought the suit precludes any consideration of comity or preservation of "dignity".

The doctrine of sovereign immunity is an anachronism. Most of the civilized countries of the world have drastically restricted its application. The legislative branch of our own government has enacted laws enabling our citizens to bring suit against the United States in the Court of Claims and, at a very early date, enacted a statute providing for offsets or "credits". In suits brought by the United States, counterclaims such as those pleaded in this case would be permitted by way of offset. Many

foreign governments have restricted the doctrine of sovereign immunity as applied to themselves and, also, to other foreign sovereigns suing in their courts; and our State Department has indicated that it favors restrictions on the doctrine of sovereign immunity when invoked by foreign governments. It is time for our courts to reexamine the doctrine of soverign immunity as applied to foreign governments so that resort to that doctrine may no longer be a means of defeating the ends of justice.

The lower court here found, for reasons not wholly explicit, that there must be a direct connection between the claim asserted in the complaint and any permissible counterclaim. This assumption was based upon its acceptance of the proposition that some limitation on the scope of counterclaims against a sovereign was proper. Even adopting such a limitation, it is the contention of the petitioner that the counterclaims here under consideration *did* arise out of the same "transaction" which is the subject matter of the action. The Republic of China and the City Bank have had banking relationships with each other for many years and the debts which are the subject of the counterclaims are incidents of this long association.

The action by the plaintiff is to collect from the defendant bank a bank account established by transfer of funds from Shanghai, China, in 1948 (R. 13), the very year in which the defendant advanced funds in Shanghai, China, to the plaintiff in even greater amount. Unpaid portions of funds previously advanced both in Shanghai and in New York were outstanding. Thus, the obligations of the plaintiff to the defendant are part of a long chain of events logically connected, one link of which is the basis for the plaintiff's claim against the defendant. Under the broad interpretation which has been given to the word "transaction" in construing Rule 13 (a) of the Federal Rules of Civil Procedure, and in accordance with the fundamental purpose of Rule 13 to settle in so far

as possible all disputes between the litigants at one trial, these counterclaims are proper and should be allowed.

Presentation of Argument

The court here adopted two postulates which it held to be fixed rules of law binding upon it. These were: that a foreign sovereign impliedly consents only to counterclaims arising out of the subject matter of the action, and the other: that a foreign sovereign may not be sued in the courts of the United States without its consent.

The petitioner's brief will, in Points I, II and III, show that the first assumption above mentioned is not binding in this case, or even tenable, for there is no precedent for the limitation of a counterclaim against a foreign sovereign to the subject matter of the action; that, even if such limitation exists, the counterclaims here pleaded are within that limitation; and that, in construing the proposition, the lower courts applied it too broadly.

The petitioner, in Point IV, will show that, even accepting the restrictions adopted by the courts below, the counterclaims here come within well defined exceptions.

In Point V, it will be shown that the second proposition which the Court of Appeals felt binding upon it, that a sovereign may not be sued without its consent, is not controlling in this case; "consent" of a sovereign is always an "implied consent", and the plaintiff here is not immune from liability.

POINTS

I

There is no reason why a counterclaim against a foreign sovereign should be limited to the subject matter of the action and there is no authoritative precedent for such limitation.

The City Bank and The Republic of China have had business relations with each other for years. Since 1920 the City Bank has made loans secured by Chinese Treasury Notes, the unpaid balance of which now amounts to more than $700,000. These loans were made in good faith, but The Republic of China, although it acknowledges its indebtedness, has defaulted on its obligations. Several demands for payment have been made, but rejected.

Now, The Republic of China has come into our courts seeking payment of a $200,000 account held by the City Bank in the name of an agency of that government. In an effort to minimize its losses, the City Bank has attempted to prevent this recovery by asserting, as counterclaims, the indebtedness owed to it by the plaintiff. The City Bank does not seek an affirmative judgment against The Republic of China,[1] but raises the counterclaims merely as a defense to the action. Whether such a pleading be called a set-off, recoupment or counterclaim, its purpose is to defeat a recovery by the plaintiff.[2] In re-

[1] It is conceded for present purposes that affirmative relief cannot be granted against a sovereign without its consent. *De Groot* v. *U. S.*, 5 Wall. 419; *United States* v. *Shaw*, 309 U. S. 495; *French Republic* v. *Inland Nav. Co.*, 263 Fed. 410.

[2] It should be pointed out that much of the confusion existent in this field arises from indiscriminate use of the words "recoupment", "set-off" and "counterclaims". Today under the Federal Rules, all claims brought by a defendant against the op-

sponse to these counterclaims, The Republic of China endeavors to raise the shield of sovereign immunity, contending that the two counterclaims are in effect separate actions against a friendly foreign sovereign which has not consented to be sued.

If the government of the United States brings an action against a private individual or corporation based on an alleged indebtedness to the government, the defendant may claim as a credit any indebtedness to him from the government, whether or not arising from the same transaction on which the government's claim is based. The courts have so held on numerous occasions in giving effect to legislation originally enacted by the Congress more than a century and a half ago.

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posing party are denominated "counterclaims", and include those claims formerly known as "set-off" and "recoupment". See Federal Rules of Civil Procedure § 13 and Moore's Federal Practice, Vol. 3, § 13.02. The meanings of these terms are still significant in studying early cases, however, and it is especially important to bear in mind the differences between these remedies in the cases here examined.

Recoupment was a defense at common law which permitted a defendant "to show for the purpose of reducing the plaintiff's recovery any facts arising out of the transaction sued upon or connected with the subject thereof which facts might have founded an independent action in favor of the defendant against the plaintiff". Clark on Code Pleading § 100.

Set-off was originally an equitable remedy which allowed the defendant to raise claims arising out of transactions independent of those sued upon. Later, a statutory set-off was permitted at law. Clark on Code Pleading, *ibid.* "The right of set-off is based on principles of right, justice and benevolence" and these broad equitable principles may be applied both at law and in equity. 80 C. J. S. 8.

"Counterclaim, which is a creation of statute and did not exist at common law, is frequently more extensive than set-off or recoupment, or it is the equivalent of the two combined, or includes them both." 47 Am. Jur. 709. Under earlier State Codes counterclaims were usually limited to the subject matter of the action. Clark on Code Pleading, *ibid.*

"In this brief all such claims will be called 'counterclaims' in accordance with the Federal Rules."

U. S. v. *Wilkins*, 6 Wheat. 135, 144;
Watkins v. *U. S.*, 9 Wall. 759;
U. S. v. *Buchanan*, 8 How. 83;
U. S. v. *Eckford*, 6 Wall. 484, 491;
U. S. v. *Shaw*, 309 U. S. 495, 501-2;
28 U. S. C. § 2406.

It is somewhat startling that a foreign government should be supposed to enjoy immunity from defenses to which the government of the United States is subject. The immunity from suit of the government of the United States has been said on many occasions to be absolute, except where it has expressly consented, by statutory enactment, to be sued. *De Groot* v. *U. S.*, 5 Wall. 419. In the case of foreign governments, however, there has never been legislation by the Congress or by any State legislature defining the nature and extent of the immunity foreign governments should enjoy in our courts. The law on the subject is entirely judge-made; and, in the absense of any definitive pronouncements by this Court, a great deal of confusion has arisen because of various theories adopted by the courts in a great variety of cases involving foreign governments.

In order to avoid unjust or inequitable results in certain cases, the courts have resorted to legal fictions from which they were able to find an "implied consent" by the government involved to have certain claims asserted against it. The most obvious situations in which the courts have found such implied consent have been those involving a single transaction, as to which the rights of both parties must be determined in order to achieve a just result. It is respectfully submitted, however, that there is no sound judicial reason for limiting defenses and counterclaims to the "same transaction."

In a case quite similar to this[1] the District Court for

[1] *State of Russia* v. *Bankers Trust Co.*, 4 F. Supp. 417, 420; aff'd 83 F. 2d 236.

the Southern District of New York, in denying plaintiff's plea of sovereign immunity, said:

> ". . . it would seem to me inequitable to direct the defendant to pay its debt to the plaintiff when there is a counter debt of far larger amount justly due to the defendant for which it has no remedy. The plaintiff's sovereignty protects it from independent suit, and, furthermore, its property in this country amounts to only a very small part of its indebtedness here, so that, if the offset is barred, the defendant has no remedy whatever. It would be a little too much like tying a defendant hand and foot and letting a plaintiff go through his pockets, and the fact that the plaintiff is a sovereign state does not completely satisfy the moral sense. . . ."

It has been the long-accepted rule that, upon principles of comity, a friendly sovereign may not be sued in our courts without its consent.

> *The Schooner Exchange* v. *M'Faddon,* 7 Cranch 116;
> *Beers* v. *Arkansas,* 20 How. 527, 529;
> *Kingdom of Roumania* v. *Guaranty Trust Co.,* 250 Fed. 341;
> *Lyders* v. *Lund,* 32 F. 2d 308.

But this immunity cannot be asserted when a sovereign voluntarily comes into our courts seeking their aid. Comity does not require that our courts render a United States citizen defenseless in an action initiated by a foreign sovereign. As this Court has said:

> "It is true that upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent. See *The Exchange,* 7 Cranch 116; *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562; *Compania*

Espanola v. *The Navemar*, 303 U. S. 68. But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. See *The Sapphire*, 11 Wall. 164, 167; *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255; 139 N. E. 259. By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought . . ."

Guaranty Trust Co. v. *United States*, 304 U. S. 126, 134.

Thus, a foreign sovereign which comes into our courts impliedly consents to a determination of the controversy, on just and equitable principles.

Republic of China v. *American Express Co.*, (C. C. A. 2d) 195 F. 2d 230;
In re Monongahela Rye Liquors, 141 F. 2d 864;
Cf. Porto Rico Co. v. *Ramos*, 232 U. S. 627;
Veitia v. *Fortuna Estates*, 240 Fed. 256.

As stated by Judge Chase in *Republic of China* v. *American Express Co.* (*supra*) at page 233:

". . . Accordingly, we have held that a sovereign who sues in our courts so submits itself to the jurisdiction it has invoked that defenses by way of set-off and of counterclaim are available against it. *United States* v. *National City Bank of New York*, 2 Cir., 83 F. 2d 236, certiorari denied, 299 U. S. 563, 57 S. Ct. 25, 81 L. Ed. 414; see *Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 2 Cir., 43 F. 2d 705, 708, certiorari denied, 282 U. S. 896, 51 S. Ct. 181, 75 L. Ed. 789. . . ."

This statement of the law appears just and reasonable; but some of our courts, whether through a misun-

derstanding of earlier cases or through an unconscious application of outmoded principles of pleading, have put a qualification upon this implied consent to suit by counterclaim. It has been said that counterclaims against a sovereign must be based upon the "subject matter" of the suit.

United States v. *New York Trust Co.*, 75 F. Supp. 583;
Republic of China v. *American Express Co.*, (*supra*);
Kingdom of Roumania, 250 Fed. 341.

The authority for this limitation is hazy. For example, in *Republic of China* v. *American Express Co.*, the court cites *The Thekla* (266 U. S. 328) as standing for this proposition. In *The Thekla*, the lower court had entered a decree against the United States for $120,619.71, and the question was whether the District Court was empowered by law to render this decree. In holding that it was, the court stated that since the United States had voluntarily come into the admiralty action as a libelant, justice would be done with regard to the "subject matter". This is obviously a long way from saying that a counterclaim against a foreign government, when interposed by way of defense, must be limited to the subject matter of the suit. *The Thekla* was an admiralty action and decided that, because of the peculiar nature of such actions, complete justice could not be done unless an affirmative judgment was entered against the United States. The reasoning of the court is explained in *United States* v. *Shaw* [309 U. S. 495, 502], as follows:

> "The Thekla turns upon a relationship characteristic of claims for collision in admiralty . . . The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire dam-

> age is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages. . . ."

Thus, *The Thelka* had nothing to do with *what type* of counterclaim may be interposed as a defense but dealt only with the *extent* of its imposition in an admiralty suit. Mr. Justice Holmes expressly indicated that the scope of counterclaims against a sovereign should be a broad one, such as was authorized in equitable set-offs. He said at page 341:

> ". . . the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest . . . It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

Another case frequently cited[1] as authority for limiting counterclaims against a sovereign to claims arising out of the subject matter of the action is *Bull* v. *United States*, (295 U. S. 247). In that case the Commissioner of Internal Revenue, in 1921, improperly classified $212,718.79 received by the Executor, subsequent to decedent's death, as corpus of the estate and subjected it to estate tax, which the Executor paid. Thereafter, in 1925, the Commissioner determined that this sum of money was income to the estate and subjected it to income tax. The Executor complained that the same sum of money

[1] Cited in *In re Monongahela Rye Liquors*, 141 F. 2d 864 and *United States* v. *New York Trust Co.*, 75 F. Supp. 583.

could not be both corpus and income, and taxed in each capacity. He opposed the payment of this income tax by demanding recoupment[1] of the amount mistakenly collected as estate tax and wrongfully retained. An appeal was taken to the Board of Tax Appeals. The Board sustained the Commissioner. The Executor paid the deficiency in 1928 and filed claim for refund, which was rejected. Suit was brought in the Court of Claims in 1930. The petition alleged that, if the sum of money was properly taxable as income, the United States should have credited the amount paid as estate tax against the deficiency determination of income tax. The Court of Claims rejected this plea "for the reason that the suit was not timely brought".

This Court held that the $212,718.79 was properly classified as income to the estate and taxable as such. The Commissioner's rulings, however, were held to be inconsistent. The identical money could not properly be the basis of two assessments. The Court summarizes the situation as follows (pp. 260-261):

> "In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the statute of limitations. If nothing further had occurred Congressional action would have been the sole avenue of redress."

Faced with this dilemma the Court asks (p. 259):

". . . Upon what theory, then, may the petitioner

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[1] It should be remembered that recoupment was a common law defense arising out of the transaction upon which plaintiff's action was grounded.

> obtain redress in the present action for the unlawful retention of the money of the estate? . . ."

and gives the answer as follows (p. 261):

> ". . . A claim for recovery of money so held . . . may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. *United States* v. *Macdaniel*, 7 Pet. 1, 16, 17; *United States* v. *Ringgold*, 8 Pet. 150, 163-164. . . ."

Neither of the two cases there cited is authority for the limitation imposed by the Court on the scope of the counterclaims permitted against the government. In fact the *Ringgold* case appears to indicate that there is no limit to the type of claim that can be asserted as a defense to a suit by the United States. The Court says (*United States* v. *Ringgold*, 8 Pet. 163-164):

> ". . . No direct suit can be maintained against the United States. But when an action is brought by the United States, to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. . . . The government seeks to recover money from the defendant, to which he is equitably entitled for services rendered. This court cannot see any right, either legal or equitable, in the government, to the money, for the recovery of which this action is brought."

It is clear, therefore, that the *Bull* case does not hold that all counterclaims against a sovereign (there, the United States) must arise out of the same transaction as that sued upon. The court was considering claims against a sovereign by way of recoupment only. There was no issue as to the type or scope of such a claim. The fact that the court was confining its opinion to a

consideration of recoupment only is made very clear where it said (p. 262):

> ". . . If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely."

Another case sometimes cited[1] as authority for the proposition that a counterclaim against a sovereign must be limited to the subject matter of the action is *The Siren*, (7 Wall. 152). That was an admiralty action in which the United States voluntarily appeared as a libelant. Nowhere is any language to be found sustaining such a proposition. To the contrary, the case holds that, when a sovereign voluntarily comes into court "it waives its exemption and submits to the application of *the same principles by which justice is administered between private suitors*" (p. 159 [emphasis added]). The Court said (p. 154):

> "But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard

[1] Cited in *Bull* v. *United States*, 295 U. S. 247 and the *Western Maid*, 257 U. S. 419.

to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. . . ."

The proposition that a counterclaim against a sovereign must be limited to the subject matter of the action has, therefore, no authoritative precedent whatever. This Court has never made any pronouncement upon the subject, nor has it ever reviewed any of the lower court decisions espousing such a limitation. The proposition undoubtedly owes its inception to the transposition of language dealing with recoupment, as found in the case of *Bull* v. *United States, supra*, and to principles of code pleading in general, which were formulated in this country around the middle of the last century.

See, *People* v. *Dennison*, 84 N. Y. 272.

Under the Federal Rules of Civil Procedure, where the emphasis is placed on settling as many disputes between the litigants as possible in one trial, there seems little justification for keeping alive the old restrictive forms of pleading. Our courts have long abandoned the theory that it is impossible or unjust to join parties and actions in one law suit when logic and convenience so demand, and our present-day rules of pleading have been liberally construed to conform with this principle.

Louisville Trust Co. v. *Glenn*, 66 F. Supp. 872;
Madison Mercantile Products v. *Frank Ix & Sons*, 7 F. R. D. 615.

Barron and Holtzoff speaking of Rule 13, state:

"The purpose and effect of the rule . . . is to permit any claim that defendant has against the

> plaintiff to be asserted as a counterclaim, thereby avoiding circuity of action. It is immaterial whether the counterclaim is legal or equitable or in contract or in tort, or even whether it has any connection with the plaintiff's claim. . . ." Barron and Holtzoff "Federal Practice and Procedure", Vol. 1, § 391.

There appears to be no valid reason, either as a matter of comity or public policy, for any limitation whatsoever on the type of counterclaim that may be pleaded against a sovereign. As Mr. Justice Story said in *The Santissima Trinidad and The St. Ander* (7 Wheat. 283, 353, 354):

> ". . . It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction to himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would, indeed, be strange if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. . . ."

II

Assuming that counterclaims against a sovereign should be limited to those arising out of the transaction or subject matter of the suit, the counterclaims here asserted are within that limitation.

The basis of pronouncements by some of the lower courts to the effect that a counterclaim can be asserted against a sovereign only if it arises out of the subject matter of the action, or the same transaction, seems to have been mainly a misunderstanding of some of the decisions of this Court, particularly those involving admiralty law. This limitation may also have had its origin in outmoded principles of pleading. The test that has been used by such courts to determine what type of counterclaim may be asserted against a sovereign appears to be the same as that incorporated in the Federal Rules of Civil Procedure, under Rule 13(a) entitled "Compulsory Counterclaims", rather than the broader conception of permissive counterclaims.

Although, as we have heretofore pointed out, there is no good reason and no controlling authority for so limiting counterclaims against a sovereign, it is the petitioner's contention that the counterclaims asserted by it in this action were the kind of counterclaims described in Rule 13(a) and did arise out of the same subject matter or transaction upon which the plaintiff's cause of action is based.

In *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 610, the court construed Equity Rule 30, the forerunner of present Rule 13, as follows:

> ". . . 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences,

depending not so much upon the immediateness of their connection as upon their logical relationship . . . [T]he facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim. . . ."

This broad interpretation of the word "transaction" was applied in the *United States* v. *National City Bank of New York* (83 F. 2d 236, 239), which involved facts essentially similar to those here under consideration.

See also

Lesnik v. *Public Industrial Corp.*, 144 F. 2d 968, 975.

In *Rosenthal* v. *Fowler* (D. C. N. Y. 1952), 12 F. R. D. 388, the court cites with approval Professor Moore as follows:

". . . Professor Moore, in 3 Moore's Federal Practice (2d ed.) Par. 13.13 wisely suggests:

"'An all-embracing definition [of 13(a)] cannot be given, nor is one desirable. The same flexibility and same empirical treatment is necessary in connection with "transaction or occurrence" that has been advocated and discussed in connection with "cause of action". [2 Moore's Federal Practice (2d ed.) Par. 2.06.] * * * [C]ourts should give the phrase "transaction or occurrence that is the subject matter" of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits. Subject to the exceptions, [not instantly relevant] any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim; only claims that are unrelated or are related, but within the exceptions, need not be pleaded.'"

Here, The Republic of China and the City Bank have been conducting banking business with each other for many

years. When this action was commenced, the monetary balance of all these years of transactions was in favor of the City Bank. It would appear entirely improper and inequitable to separate a single incident—(the Shanghai-Nanking Railway deposit account) from this long series of occurrences so as to grant a recovery to The Republic of China. It would be a narrow and forced construction of Rule 13(a) to ignore the many years of prior banking relationships in favor of one isolated circumstance. Therefore, these counterclaims should be allowed to stand because they are part of a chain of events, logically connected, one link of which makes up the subject matter of the suit brought by The Republic of China.

III

Sovereign immunity as defined by the lower courts does not conform to the present state of the law or with the ideals of responsible government.

The doctrine of sovereign immunity, as it has been applied in this case, permits a foreign government to be financially irresponsible. It places the American courts in the position where they must ratify unconscionable repudiation of debts freely assumed by foreign governments with American institutions. It is such a result as here achieved that has brought the concept of sovereign immunity into such great disfavor. This doctrine from various angles, and none the least from the ethical standpoint, has been criticized from bench[1] and bar[2] for many years.

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[1] See *Chisholm* v. *Georgia*, 2 Dall. 419, 471, 1 L. Ed. 440; *United States* v. *Wilder*, 3 Sumn. 308, 315-317, Fed. Cas. No. 16,694; *Wallace* v. *United States*, 142 F. 2d 240, 243.

[2] See *"Historical Approach to the Doctrine of Sovereign Immunity"* 13 La. L. Rev. 476; *Borchard "Governmental Responsibility in Tort"* 34 Yale L. J. (1924), 129, 229, 36 Yale L. J. (1926), 757, 1039.

Judge Frank, in the opinion below, criticized the doctrine (R. 68, *ante*, p. 6).

In *United States* v. *Lee* (106 U. S. 196), Mr. Justice Miller said (p. 206):

> ". . . As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests . . ."

and again on pages 208, 209:

> "Under our system the *people*, who are there [in Britain] called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

In 1946, Mr. Justice Frankfurter, dissenting in *Kennecott Copper Corp* v. *State Tax Commissioner* (327 U. S. 573, 580-581) said:

> "Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. 'It is,' wrote Lincoln in his First Annual Message, 'as much the duty of Government to render prompt justice against itself in favor of citizens as

it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.' 7 Richardson, Messages and Papers of the Presidents, 3245, 3252. Both the United States and the States are immune from suit unless they agree to be sued. Though this immunity from suit without consent is embodied in the Constitution, it is an *anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.*

"Not so long ago this Court acted on the realization that 'the present climate of opinion . . . has brought governmental immunity from suit into disfavor.' *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391. Today the Court treats governmental immunity from suit as though it were a principle of justice which must be safeguarded even to the point of giving a State's authorization to be sued the most strained construction, whereby a federal court sitting in Utah is made to appear not a 'court of competent jurisdiction.' Thus, while during the last seventy-five years governmental immunity from suit, as *a doctrine without moral validity*, has been progressively contracted, the Court now takes a backward step by enhancing a discredited doctrine through artificial construction." (Emphasis added)

Why should not a government be held liable for its just debts as any other person? It has been said that we must recognize the "dignity" of a sovereign,[1] but is it

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[1] *The Schooner Exchange*, 7 Cranch 116.

In *The Roseric* (254 Fed. 154, 158), the court, in construing *The Exchange* case, said:

"The immunity there accorded was not due to a lack of judicial power. The power was assumed, but its exercise was waived out of a due regard for the dignity and independence of a sister sovereignty, with whom this nation was at peace. The implication is that to insist upon jurisdiction in such in-

really undignified to pay one's debts? If a responsible sovereign government has so little regard for its dignity that it has flatly refused to pay its just obligations, it does not seem likely that its dignity could suffer any further humiliation by having those debts recognized in a court of law. In truth, upon close examination, there appears to be no sound reason why our courts should countenance such a doctrine.

The doctrine of sovereign immunity has never been adequately explained. In *United States* v. *Lee* (*supra*), the court said, at p. 207:

> "And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time [*Cohens* v. *Virginia,* 19 U. S. 264 (1821)] been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine. . . ."

In *United States* v. *Shaw* (309 U. S. 495, 501), the court attributed the doctrine to several vague origins, saying:

> ". . . The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. . . ."

It should be noted that very early in our history our government enacted legislation[1] which authorized counter-

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stances likely would be considered by the foreign sovereign as a reflection upon its dignity and an interference with its independence, and would tend to strain and possibly disrupt amicable relationships."

[1] Act of March 3, 1797, Sess. II, Chap. XX.

claims to the extent of the government's claim where the government voluntarily sued. This statute has been liberally construed and, although no mention is made in the statute of the scope of a counterclaim to be allowed against a sovereign, this Court, in *United States* v. *Wilkins* (6 Wheat. 135, 144, 145), expressly stated that such counterclaims may arise out of transactions not the subject matter of the suit. In construing the third and fourth sections of the statute the Court said:

> ". . . The terms of these sections are very broad and comprehensive . . . There being no limitation as to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the act, that it intended to allow the defendant the full benefit at the trial of any credit, *whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction,* which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. The object of the act seems to be to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only as the defendant in equity and justice should be proved to owe to the United States. If this be the true construction of the act, which we do not doubt, the defendant might well claim a credit in this suit for the sums due to him, *even if they had grown out of distinct and independent transactions,* for he is legally, as well as equitably, entitled to them. . . ." (Emphasis added)

If "dignity" of the sovereign is a basis for the granting of immunity, is there any reason why our courts should recognize a dignity in a foreign sovereign which they have not seen fit to recognize in the United States Government? Certainly the fact that here the foreign sovereign has refused to pay its debts to a corporation organ-

ized under the laws of the United States ought to make the answer to this question apparent.

But, assuming that there may still be valid reasons for granting friendly foreign sovereigns a limited immunity from suit in our courts, the immunity should not include a protection from counterclaims such as are asserted here.

In the *Gloria* (286 Fed. 188), the court said (p. 194):

> "There is no principle of public law exempting a sovereign state from its obligations under the law. It should not be assumed that a state desires to deny or evade its obligations. There may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state. But, once the state has chosen its forum, there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice."

In *People* v. *Brandreth* (36 N. Y. 191, 196, 197), Judge Hunt, dissenting from a majority opinion which dodged the issue of sovereign immunity, said:

> "Although a State cannot be sued, I think it is subject to a set-off, like individuals, when it comes into court as a plaintiff, and this, both upon principle and authority. When it becomes a suitor, it waives, for the time, its dignity as a sovereign. It lays aside its strong arm, by which it can at once enforce its own claims, and submits itself to the arbitration of the courts, and to its practice and its proceedings. For this purpose, it is like an individual or an inferior corporation, and becoming voluntarily a party to a suit, no good reason can be given why it should not be bound by the same rules that are applicable to other parties in the same position. . . ."

When a foreign sovereign comes into our courts it waives its immunity and should be prepared to meet defenses and counterclaims just as any other litigant. A foreign sovereign which voluntarily institutes a contest in our courts has no right to expect that our courts will condone an unfair contest by depriving the defendant of the weapons with which to defend himself.

IV

The indebtedness of The Republic of China is payable at the petitioner bank.

In the courts below the petitioner contended, as one of the grounds for sustaining the counterclaims, that they were payable at the City Bank and that, therefore, under decided cases and pursuant to § 147 of the Negotiable Instruments Law of the State of New York, they should be considered as a direction to pay the obligee to the extent of the bank account sought to be recovered in the action.

> *United States* v. *National City Bank of New York*, 83 F. 2d 236, 239.

The petitioner does not deem it necessary to devote any extended argument to this contention, because it believes that sufficient grounds have been presented in this brief as to why the counterclaims should be allowed. However, in the opinion of the Court of Appeals, reference was made to this argument and the second counterclaim was dismissed for the reason that the Treasury Notes therein referred to, although payable at the Shanghai Branch of the City Bank, were not payable at the City Bank, because a foreign branch of a national bank association must be treated as a separate entity under

§ 25 of the Federal Reserve Act; 12 U. S. C. §§ 601-604 (R. 69-70).

It would be unfortunate if such an interpretation of § 25 of the Federal Reserve Act should be permitted to remain on the books as authoritative. The language of that section is:

> "Every national bank association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item."

It is true that, with respect to certain banking transactions, foreign and even domestic branches of a national bank have been treated by the courts as banking entities separate from each other and from the head office.

> *Pan American Bank & Trust Co.* v. *National City Bank*, 6 F. (2d) 762, 767;
> *In re Harris*, 27 F. Supp. 480;
> *Marlboro Trust Co.* v. *Elliott*, 86 F. (2d) 315, 316-17;
> *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. (N. Y.) 742.

However, no matter how many branches, foreign or domestic, a national bank may have, it is still a single corporation. The bank as such is responsible for all its obligations, whether originating at the head office or at a branch. If a branch is closed, the bank at its head office must make good to all depositors and other creditors of the branch.

> *Sokoloff* v. *National City Bank of New York*, 130 Misc. 66, aff'd 223 App. Div. 754, aff'd 250 N. Y. 69;

Wallace v. *State Bank*, 7 Ark. 61;
Michie on "Banks and Banking", Vol. 1, Chap. 2, § 27;
Zollman on "Banks and Banking", §§ 1295 and 1296.

It has never before been suggested that a national bank cannot collect obligations owing to or payable at one of its branches, particularly when that branch has been closed, as is the case with the Shanghai Branch of the City Bank. Obviously a private individual or corporation could not collect a deposit account at the head office of a national bank, if he or it were in default in the repayment of a loan for a larger amount negotiated at one of the bank's branches. There can be no question that, in such a situation, the bank would be entitled to apply the balance in the deposit account to the payment of the loan, whether on the theory of a "banker's lien" or set-off.

There is no reason why the same rule should not apply to the deposit account of a foreign government or an agency of such government.

The finding by the court that the Notes mentioned in the first counterclaim, a direct obligation of the plaintiff herein held by one bank for the benefit of all others bound together in a syndicate to loan money to the plaintiff, was not "payable" at the bank here because by its terms it was payable at another bank of that syndicate (R. 69), represents a glorification of literalness and a denial of principle for which there can scarcely be found a precedent since the time of the rise of the courts of equity to prevent injustice by the too literal application of technicalities. The note was payable at one of the member banks of the syndicate and was held by Morgan & Co., the manager of the syndicate, for the benefit of all the members. The defendant here had a large participating interest (R. 24). Clearly, in principle, the note was "payable at the defendant", if that be a significant condition to its right to plead it as a counterclaim.

V

The plaintiff sovereign has no immunity from jurisdiction of American courts.

The District Court held that the defendant's counterclaims (set-off) were each the equivalent of an independent suit and in this pronouncement, the Court of Appeals concurred, saying:

> ". . . For the assertion against a sovereign government of a counterclaim or set-off, unrelated to the claim asserted by the sovereign in its suit, is the equivalent of an independent suit against that sovereign brought without its consent. . . ." (R. 68).

This coupled with the further statement of that same court that

> ". . . a friendly, foreign sovereign, recognized by the United States, cannot be sued in the courts of this country without its consent. . . ." (R. 67)

were the premises of a syllogism. The logical deduction from the major and minor premises above quoted creates the situation by which the foreign sovereign is permitted to determine that the defendant bank may not plead certain facts which would defeat the sovereign's claim.

The Court of Appeals was not unmindful of, or indifferent to, the peculiar result thus achieved by the plaintiff sovereign's motion to exclude the counterclaims and observed that the doctrine of sovereign immunity was one considered basically immoral by many. But in maintaining this position, the court expressed itself as bound by the premises which it accepted. It was in this expression of helplessness to do complete justice here that the court erred, and its error was two-fold.

These two errors are: first, that the court considered these counterclaims independent suits, which they are not; and, second, that as independent suits, the court had no jurisdiction over the plaintiff as to the counterclaims.

The petitioner, in Points I, II and III hereof, has shown that there is no basis for the first limitation assumed by the District Court and the Court of Appeals which excluded the present counterclaims as a proper pleading by the defendant to defeat the plaintiff's claim as against it.

We then come to the supporting statement, which is really the major premise of the two, that a foreign sovereign may not be sued without its consent. For this we may consider the position of the plaintiff sovereign as though the counterclaims were indeed independent suits.

Two questions are involved in an independent suit against a sovereign. One is—does the court have jurisdiction? The other, after the first has been affirmatively answered, is—what is the breadth of immunity which should be granted to a sovereign?

The United States Has Jurisdiction over the Plaintiff Sovereign

Since the United States is itself an independent sovereign and therefore supreme within its own territory, it has exclusive and absolute jurisdiction within that territory. This complete and universal jurisdiction is subject only to such limitations as the United States itself consents to place upon it. What limitations should be placed upon it becomes, therefore, a matter of national policy. These are the principles as to jurisdiction laid down by Chief Justice Marshall in the case of *Schooner Exchange* v. *M'Faddon* (*supra*, p. 14), who said:

". . . The world being composed of distinct sov-

> ereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers."

This principal remains as true today as when enunciated in 1812.

In the present case, the foreign sovereign has voluntarily entered our courts and has asked our courts to exercise jurisdiction in a controversy between it and the defendant. By voluntary appearance here, the sovereign has requested this controversy presented by it to be settled in accordance with the laws of the forum. After defendant served its pleadings, putting in issue other factors in the relations between it and defendant, the sovereign asked the court to protect it against the legal result of these counterclaims. The sovereign says the United States courts have no jurisdiction to consider the effect of any dealings with defendant bank, other than those the sovereign itself presents.

John Marshall more than one hundred and forty years ago found that any granting of immunity was to be determined on practical international considerations. It is right and proper therefore to follow Marshall's thesis and practice in arriving at a conclusion here. The first question to be asked and answered is the one Marshall himself propounded—What are the "usages and received obligations of the civilized world"?

From this naturally arises the particular question as to what attitude the United States itself has now adopted

toward the problem of sovereign immunity and what immunity or lack thereof would be granted or withheld in the interest of the United States. In considering, then, what is the proper relation of our courts to this particular foreign sovereign suing to collect a bank account and the defendant to whom that sovereign owes far more than it is seeking to collect, we must consider the breadth of immunity which should be granted in such case under three headings:

(1) What precedents exist in the state of the law throughout the world at this time? Do other countries recognize such sovereign immunity? That question is one of international law.

(2) What is the attitude of the United States in its foreign relations towards the problem of sovereign immunity?

(3) What law should now be imposed in the interest of the United States in its world position and in accord with the principles of international law?

Democratic Countries Throughout Europe Do Not Now Generally Grant Immunity to Foreign Sovereigns Against Enforcement of Contracts Made Under Their Jurisdiction by Such Foreign Sovereigns

John Marshall wrote his famous opinion in the case of *Schooner Exchange* early in the nineteenth century. He found no precedents to guide him and he trod, as he said, "an unbeaten path". For the next fifty years the courts of all European countries, when faced with similar cases, abstained from exercise of jurisdiction over sovereign states. In general, European courts granted sovereigns immunity from all acts which commercially affected nationals of their own countries.

The situation is far different today. In this, the middle of the twentieth century, we observe throughout the

democratic countries of Europe almost universal remission of the classical doctrine of absolute immunity. Sovereigns are now held liable for the contracts which they make with citizens and corporations subject to the jurisdiction of a foreign country. Courts have even gone so far as to exercise initial jurisdiction over a sovereign by calling it to court and have ended with seizing sovereign property to satisfy the judgments. The practical difficulties of acquiring initial jurisdiction and of entering an affirmative judgment against the sovereign are not present in this case.

A few instances of this change which began in the last century may be mentioned by way of illustration.*

Belgium

Among the first which repudiated the doctrine of absolute immunity appears to be Belgium. In 1879, for the first time, an appellate court, the Court of Appeals of Ghent, restricted the immunity of a foreign state, where that sovereign state had acted commercially within Belgium. This case involved the purchase and sale of guano. The Court made a differentiation by granting immunity for governmental acts and exercising jurisdiction with respect to non-governmental acts.[1]

A little later, in 1888, the Civil Tribunal of Brussels made the same differentiation in a suit brought against the Minister of War of Bulgaria to secure payment on a contract with a Belgian company for the purchase of bullets for the Bulgarian Army. Here in spite of an express

* Citations to foreign cases are collected in the order in which reference is made to them in this text in Appendix B. The numbers in the text refer to the corresponding numbers in said appendix. When a case is quoted or paraphrased, the quotation referred to is given in the language used by the court. A literal English translation of each quotation is also given.

agreement in the contract between Bulgaria and the private merchant of Belgium that, for the settlement of any disputes arising under the contract, recourse must be had to Bulgarian courts, the Belgian court held that Bulgaria had acted as a private person in making this contract, thus submitting itself to all the civil consequences.[2]

That the purchased supplies were for the army is not considered. In 1903, the Court of Cassation had opportunity to decide on this question and it acknowledged the practice followed by some of the lower courts.[3] It therewith fixed the Belgian doctrine of no immunity for a government acting commercially.

Italy

The same progression of thought and judicial determination has occurred in Italy. As early as 1886, that is before the centralization of the judicial system, some of the regional courts of cassation were faced with this problem and decided to exercise jurisdiction over the foreign sovereigns when they had acted *iure gestionis*, as "*ente civile*" and not as "*ente politico*". The form of the act, not its purpose, was held decisive.[4] In 1892 the Court of Cassation of Venice exercised jurisdiction and condemned Austria to pay an Italian enterpriser who had done construction work on fortifications on the Austrian border of Venice before the separation of this Italian province from Austria.[5] After the centralization the highest Italian Court, the Court of Cassation, had first opportunity to decide on this point in 1925 [6] and it confirmed this decision a year later, when it judicially ascertained the indebtedness of the Roumanian government to an Italian merchant, who had sold to said sovereign a quantity of leather for army boots.[7] In 1935 this doctrine was again affirmed in a case involving commercial representation by the U. S. S. R. and it has been the accepted doctrine since that time.[8]

France

It appears that France hesitated much longer to accept the new doctrine of restricted immunity. In 1929 the Court of Cassation first exercised its jurisdiction, when a foreign sovereign had acted commercially within its jurisdiction.[9] This new doctrine became definitely fixed in 1936, when the Court of Cassation abruptly rejected an appeal from the Parisian Court. In so rejecting the appeal the high court stated that the introduction into and sale within France by a commercial representative of the U. S. S. R. of counterfeited samples of the memoirs of a poet constituted a tort committed through commercial acts for which the Government was liable.[10]

Switzerland

Switzerland followed the example of Belgium and Italy rather early. In 1918 in a case based upon a financial operation similar to the one in question today, the Swiss Supreme Court exercised its jurisdiction and ordered Austria to pay to Swiss nationals, bonds which the Austrian Imperial Royal Government had issued in 1914 as tax free and with 4½% interest and which had become due to be paid in Switzerland according to a clause in the indenture. This clause said that the payment of interest and the repayment of the capital would be made "with the Imperial Royal Treasury in Vienna in kronen or at places to be made known . . . in Switzerland for the pieces stamped in Switzerland in Swiss francs". The court grounded its decision on a finding that the legal relationship which was created between Austria and the buyers of the bonds belonged in the realm of private law, and that the whole transaction had taken place in Switzerland.[11] The facts in the case before the court today are essentially the same.

Austria

In 1950 Austria[12] definitely abandoned the doctrine of absolute immunity. This affirmance of the exercise of restricted jurisdiction, meaning liability for commercial acts, was evidenced by entry in the Book of Decisions (Spruchrepetitorium) of these principles.[13] Such an act means that the Supreme Court itself cannot overrule a principle therein laid down except by a certain majority of judges. In this opinion, the court, before coming to a decision, made a thorough analysis of the authorities on which it relied to show how it came to its conclusions. The court there first referred to the ways in which the problem of sovereign immunity had been dealt with in the courts of Austria up until that time as well as in Italy, Belgium, Switzerland, Egypt, Germany, England, United States, Czechoslovakia, Poland, France, Greece, Brazil and Chile. After considering these authorities, it then explored the arguments of writers learned in the law, particularly Austrian writers. It then considered international treaties existing in this general field and finally concluded that there was no acknowledged rule of international law according to which the so-called *acta gestionis* of a foreign state should be exempt from jurisdiction. The court then declared that there was no rule of the forum either to impose restrictions farther reaching than those of international law and that, therefore, no reason existed why a foreign state for *acta gestionis* should not be treated in its courts as a foreign private person would be treated. This, it concluded, would not violate international law, because any act which was recognized by international law as an act *iure imperii* would be respected by the Austrian domestic law as such.

For discussion of this case see American Journal of International Law, 1951, Vol. 45, p. 354.

Germany

With regard to Germany, it was only after World War II that some of its courts departed from the classical doctrine of absolute immunity expressly following the example of other countries. Before this change the highest German court had reached a conclusion strikingly similar to the lower court in this case.[14] In 1951, however, the Court of Appeals in Hamm allowed a restitution action of the former (Jewish) owner of real property sold to the Italian state during the Nazi regime, as the Italian state in this transaction had appeared as the subject of private rights and obligations.[15] In 1953, the Landgericht in Berlin as well did not grant immunity for the bombed-out ruin of the Latvian Legation in Berlin against plaintiff, who had sold such real property in 1939 because of racial persecution.[16] Again in 1953, the Landgericht in Kiel had adjudicated compensation for damages which had arisen out of an accident on a Danish bus which belonged to the Danish State Railway.[17] The Court made the same differentiation of the state as a sovereign and as a subject of private law, because sovereigns more and more participate in economic activities and because their creditors would be damaged, if not given appropriate legal protection.

In regard to Great Britain the State Department in a letter discussed *post* (p. 43, and reproduced for the convenience of the court in its entirety, Appendix C) has stated:

> ". . . There are evidences that British authorities are aware of its (the doctrine) deficiencies and ready for a change. . . ."

There appears to be ample precedent that the divine right of kings is not now an accredited doctrine in the democratic states of Europe.

Attitude Expressed by the State Department for the United States, in Its Foreign Relations

The State Department has expressed most clearly the position of the United States in regard to the right of a foreign country in our courts in respect to immunity. In a letter by the then Acting Legal Adviser, dated May 19, 1952, addressed to the Acting Attorney General, Philip B. Perlman, it says:

> "The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain cases. . . ."
>
> See *supra*, p. 42. Text of Letter, Appendix C, *post*, p. xvii.

The State Department indicates that the attitude of the United States towards sovereigns suing in United States courts has changed over the years and that this change has been in more recent times a rapid one. The two theories of sovereign immunity are set forth with the clearest possible indication that the State Department favors the "restrictive", not the "absolute" theory of sovereign immunity.

In so stating the policy, the writer of the letter, speaking for the State Department, points out that most of our allies adhered to, or are tending towards this restrictive theory and only those of the different philosophy as to private property have continued the full acceptance of the absolute theory.

The State Department is then careful to point out that this, which it terms a shift of policy by the executive branch, cannot control the courts, but, as the granting of sovereign immunity to a foreign litigant is to a large extent a matter of proper relations within the family of nations (thus adopting the Marshall thesis), this shift of policy is clearly the reason why the courts should reconsider the position of a friendly sovereign as a litigant.

Much has been said and written as to whether or not it was within competence of the State Department to publish such a letter and if this would be "controlling" on the courts. The petitioner believes that it is not necessary to enter into any controversy concerning the limits of the three independent branches of our Government or specifically, if a pronouncement of our State Department would be "controlling" on the courts.

The petitioner wishes to rely upon the letter from the State Department only to this extent; that this Department, charged with maintaining friendly relations between nations and of recognizing the existence of unfriendly relations, when such unhappily arise, has, in the course of its obligations, observed a shift of policy in other countries relating to the question before this Court—the breadth of sovereign immunity—and has called this to the attention of the law enforcement department of this Government. The petitioner conceives this letter from the State Department as in the nature of testimony by an expert witness in respect of foreign relations.

The State Department has begun, also, to exemplify its views here by the type of treaties of friendship and commerce which it is making with other countries. These waive the immunity under a standard formula as follows:

"No enterprise of either party, including corporations,

associations, and government agencies and instrumentalities, which is publicly owned or controlled, shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territorities of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

Treaties containing this or similar clauses have been concluded or are being negotiated with:

Denmark, Senate Exec. I. 82d Cong. 2d Sess. Art. 18(3) 1952;
Greece, Senate Exec. J. 82d Cong. 2d Sess. Art. 14(5) 1952;
Colombia, 1951 Art. 18(2);
Israel, Oct. 18, 1951, Exec. R. 82d Cong. 2d Sess.;
Uruguay, Nov. 23, 1949, Senate Exec. D. 81st Cong. 2d Sess.;
Ireland, Jan. 21, 1950, Art. 15, Treaties and Other International Acts Series, No. 2155;
Italy, Feb. 2, 1948, Art. 24, par. 6, Treaties and Other International Acts Series, No. 1965.

Reference should also be made to the case of *U. S.* v. *Deutsche Kalisyndikat Gesellschaft*, 31 F. (2d) 199, 201:

"The treaty existing between Germany and the U. S., like Art. 281 of the Treaty of Versailles, provides that, if the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty."

The treaties above mentioned are consistent with another new provision which may be found in treaties being

negotiated by the United States. This is directed to the assurance that the nationals of the United States whose property is "nationalized" in other countries will be compensated. Such treaty provisions are inconsistent with the theory of absolute sovereign immunity. A typical provision of such a treaty reads as follows:

> "Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public benefit, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."[1]

The Acts of The Republic of China Set Forth in the Counterclaims Are Acts of a Private Law Nature

The first counterclaim relates to an obligation evidenced by a note of The Republic of China to pay dollars in the United States. This note by The Republic of China was pledged by the Pacific Development Company to a syndicate of banks, including the defendant, and ultimately became the direct obligation of The Republic of China to pay to that said syndicate a large sum of money. Over $300,000 of this, not including interest thereon, is now due to the City Bank.

As to the second counterclaim, the sovereign received directly from the City Bank funds on notes of the sovereign payable at the branch of the City Bank in Shanghai where the funds were made available to the plaintiff sov-

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[1] Treaty of the United States with the Kingdom of Greece, Article VII (3), signed on behalf of the parties August 3, 1951, ratified by the United States Senate on July 21, 1953.

ereign. The sovereign here too became voluntarily indebted to the defendant, an American institution, on a contract freely entered into. It may, however, in regard to the obligations of this second counterclaim, be of some significance to consider the balance of the obligations here reflected as of the close of the year 1948, the last year in which any payments were made on its obligations to the City Bank. During that year, the Bank, as shown in the second counterclaim, advanced to the plaintiff about $137,790.60. Within that same year, the sovereign paid to the Bank on principal of loans previously made, the sum of $89,759 with accrued interest then outstanding on its obligations. This left a total amount unpaid of $390,033.60. In that same year, 1948, the plaintiff transferred through the Shanghai branch of the City Bank $200,000 to the City Bank's head office in New York, for the creation of a deposit account in the name of the Shanghai-Nanking Railway Administration. It is this deposit which the plaintiff sovereign now seeks to collect.

The commercial nature of the dealings of the plaintiff with the defendant as set forth in each of the counterclaims is clear.

Decisions of foreign courts cited *supra*, pp. 38-42 have been on states of fact so analogous to the operations of the defendant here that one may consider them in point of law identical. Contracts made with an American entity; money made voluntarily payable in dollars in the United States, are in themselves sufficient criteria to bring this financing into the category of acts of a private law nature.

What Law Should Now Be Imposed in the Interest of the United States

It is respectfully suggested that if the principles laid down by the lower court ever had any validity, they

were the expressions of the law which existed as of yesterday. As shown above they appear to be narrower than the principles laid down by Mr. Justice Marshall in his great decision of 1812, for there he found that only in three great classes of cases should the sovereign have unlimited immunity. These were the person of the sovereign, the sovereign's ambassador and troops (other warlike appurtenances) of a foreign prince. This was in 1812. One hundred and forty years have changed the circumstances and with it a concept of the functions of government. With this must come a narrower application of sovereign immunity.

Economic thinking is no longer *laissez-faire*. The United States no longer is dependent upon foreign capital for its development (although foreign investment is still welcome). It has itself become the greatest lending country in the world and both from our Government and from persons, corporate or otherwise within the United States, friendly foreign governments have borrowed for their ever expanding functions of government; their economic development.

The United States today stands with vast potential powers as to other countries, but with no hegemony over the territory of any other.

This position of the United States must be considered. It is at the present time the greatest creditor nation in the world. It is endeavoring through the realm of economics to assist all nations to economic freedom and a high standard of living. To this end, American institutions are urged to loan and to invest in foreign countries. New capital equipment creates the surplus out of which may arise a higher standard of living. The question before this Court is—are these loans investments under normal commercial rules or is the borrower to be considered as

financially irresponsible, even though capable of enforcing its obligations in the courts of the United States?

The United States is in a position to determine by its leadership and example the degree of responsibility which should be assumed by sovereigns, voluntarily if they will, imposed upon them if necessary, in their borrowings and other business dealings within the United States.

The nexus between a decision in this case and the problems of nationalization of private property in foreign countries and many other problems yet to arise under the Point IV and other investment programs, is obvious.

If it is assumed that from the standpoint of precedent the lower court had some justification for its decision, it seems the conclusion is inevitable that it applied the law of a bygone era. But it did not consider that its pronouncement was the last word on the subject, for it definitely said that if there was any marked diminution of that "hoary doctrine"—this theory of absolute sovereignty—it must look to Congress or the Supreme Court.

Congress has never legislated on this subject, nor is there any reason for it to do so. The pattern as to the treatment of foreign sovereigns is considered and a precedent established not only for this country but for other countries as well by an early decision of this Court. By tradition, therefore, as well as by inherent power, this Court has the authority and the duty to determine this matter. It is for this Court to pronounce the law of today.

CONCLUSION

The City Bank should be allowed to assert its counterclaims against The Republic of China so that the bank account held by the City Bank in the name of the Shanghai-Nanking Railway Administration may be used by the City Bank as a reduction and partial payment of the debt owed it by The Republic of China, and the judgment of the court below should be reversed.

Respectfully submitted,

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August 31, 1954.

APPENDIX A

Section 25 (b) of the Federal Reserve Act, 12 U. S. C. Section 632, first paragraph.

"Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. Such removal shall not cause undue delay in the trial of such case and a case so removed shall have a place on the calendar of the United States court to which it is removed relative to that which it held on the State court from which it was removed."

Section 25 of the Federal Reserve Act, 12 U. S. C. Section 604.

"Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

Dec. 23, 1913, c. 6, § 25, 38 Stat. 273; Sept. 7, 1916, c. 461, 39 Stat. 755."

Section 147 of the New York Negotiable Instruments Law.

"Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

Rule 13(a) of the Federal Rules of Civil Procedure.

"(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, effective March 19, 1948."

"(b) *Permissive Counterclaims.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

APPENDIX B*

Foreign Court Decisions

1. *Rau* v. *Duruty*, Court of Appeals of Ghent, March 14, 1879, Journal de Droit international privé 1881 p. 82.

> ". . . Ce principe (souveraineté des nations) peut valoir lorsqu'un gouvernement, restant dans les *limites de sa mission gouvernementale*, prend des mesures dans l'intérêt de sa conservation ou pour des actes que lui dicte l'intérêt général, mais il ne peut plus en être question alors que le gouvernement vend du guano, et . . . passe des actes et des contrats qui, de tout temps et partout, ont été considérés comme des *contrats commerciaux* soumis a la juridiction des tribunaux de commerce . . ." Translation, *post*, p. xi.

2. *Re Minister of War of Bulgaria*, Civil Tribunal of Brussels, Dec. 29, 1888, Pasicrisie, 1889-3-62, Pandectes Périodiques, 1889, No. 309.

3. *Re Liège-Limburg Railway*, Court of Cassation, June 11, 1903, Pasicrisie, 1903-1-294. By annulling the decision of the Court of Appeals of Brussels denying jurisdiction it declared that such court had wrongly applied art. 92 of the Constitution,—stating that litigation concerning civil rights and political rights of the citizens belonged to the exclusive competence of the courts,—and

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* Reports of cases decided by courts of continental countries of Europe are not usually given under the names of parties thereto as customary in American reporting. However, the cases below cited, have been further identified by reference to one or more of the principal parties involved. Italics, when appearing in the texts of the cases cited, have been added. Translations following are numbered to correspond to texts translated.

it gave such article a new interpretation, reversing its own decision of 1842, the Court reasoned:

> ". . . Att. que la règle du droit des gens qui proclame l'indépendance des nations découle du principe de leur souveraineté n'est pas en cause; — Att. que la *souveraineté n'est engagée que par les actes de la vie politique de l'Etat;*— Que les actes par lesquels la puissance publique s'affirme sont régis à l'intérieur par le droit constitutionnel et échappent, à raison de la séparation des pouvoirs, au contrôle de l'autorité judiciaire, que leurs effets en dehors du territoire ne relèvent que du droit international et sont soustraits, à ce titre, à l'appréciation des tribunaux tant du pays que de l'étranger;— Mais att. que l'Etat ne doit pas se confiner dans son rôle politique, *qu'en vue des besoins de la collectivité, il peut acquérir et posséder des biens, contracter, devenir créancier et débiteur; qu'il peut même faire le commerce, se réserver des monopoles ou la direction de services d'utilité générale;*— Que, *dans la gestion de ce domaine* ou de ces services, l'Etat ne met pas en oeuvre la puissance publique, mais fait ce que des particuliers peuvent faire et, partout, *n'agit que comme personne civile ou privée*— Que lorsqu'en cette qualité, il est engagé dans un différend, apres avoir *traité d'égal à égal* avec son co-contractant ou a encouru la responsabilité d'une faute étrangère à lordre politique, la contestation a pour objet un droit civil du ressort exclusif des tribunaux aux termes de l'art. 92 de la constitution;— Att. que les Etats étrangers sont, en tant que personnes civiles et au même titre que les autres étrangers, justiciables des tribunaux belges; . . . *que si l'Etat étranger peut saisir nos tribunaux de poursuites contre ses débiteurs, il doit répondre devant eux à ses créanciers.*" Translation, *post*, p. xi.

4. ***Typaldos, Council of Greece at Naples*** **v.** ***The Asylum of Aversa,*** Court of Cassation of Naples, March

27, 1886 Giurisprudenza Italiana, 1886 I. l. 228, the Greek council in official capacity had consented to pay for the maintenance of a Greek subject in an Italian asylum:

> "Attesoche cotesto sistema, che assume prestigio di autorità dalla giurisprudenza sinora proclivi il più delle volte a seguirlo procede da un equivoco originario, da cui derivano tutte le consequenze contrarie ai principii generali del diritto. Che fondamento di diritto internazionale sia la sovranità ed indipendenza degli Stati, ni uno potrebbe contestare; e che in consequenza di tale principio ogni stato nell'esercizio dei suoi potero sia sottratto alla giuridizione degli altre, egli e egualmente indubitato. Ma l'equivoco sta nel considerare lo stato unicamente et sempre come *ente politico*, dovechè non gli si puo negare l'attività ancora di *ente civile*, che opero nel senso di acquistare diritto e contrare obligazioni in rapporti privati, comi ogni altro ente fisico o morale capace dell'esercizio dei diritti civili. Conciossia chè importa certamente allo stato, che è a capo di gravissimi interessi di profittare di tutte le forme e rapporti contrattuali ondi si compie il movimento economico nei commerci della communanza civile considerata nel rapporto più generale dei popoli tra loro. Or il volere che anche cotesti rapporti contrattuali possero regolati dal diritto della gente, importa confondere cose ed idee diverso, e spingere un principio giusto alle piu assurdi conclusioni." Translation, *post*, p. xii.

5. ***Fisola*** **v.** ***Court of Cassation of Rome,*** **Oct. 12, 1893 Giurisprudenza Italiana, 1893 I. l. 1213.**

6. ***Commerciai Representative of U. S. S. R.*** **v.** ***Ditta Tesini e Malvezzi, Court of Cassation,*** **June 12, 1925, Corte di Cassazione, 1925, No. 1024, a contract for purchase and sale of silk cocoons.**

7. *Roumanian Government* v. *Trutta*, Court of Cassation, March 13, 1926, Corte di Cassazione, 1926, No. 1661; Giurisprudenza Italiana, 1926 I. 1. 774, Foro Italiano 1926-1-584.

"Scrittori e giudici hanno meditato su questi argomenti ed indicato la risposta. L'attuale nozione della sovranità dello Stato rifugge da quel concetto di assolutismo, che ispirava l'antica dottrina. . . . schivando l'opinione che nella communità delle nazioni la vera situazione degli Stati sia d'interdipendenza, bisogna riconoscere che in qualche modo tutte le sovranità sono l'un l'altra reciprocamente sottornesse. La sovranità dello stato puo ricevere senza, e non *ogni atto compiuto dallo stato ne interessa la sovranità.* Non si puo ammettere una esplicazione della sovranità intesa alla violazione di quei diritti maestatici, che sono reputati essenziali, tra cui à la giurisdizione sulle persone operanti nel territorio nazionale a sulle cose esistenti nel medesimo. Lo stato pur essendo sempre persona per eccellenza di diritto pubblico, alla capacità di diritto pubblico aggiunge, sia nella sfera del suo diritto interno, che nei rapporti esteriori di diritto internazionale, la capacità di diritto privato, la quale esso ha per il solo fatto della sua esistenza, confermato dal riconoscimento della sua persona giuridica internazionale non essendo concepibile un'associazione di nomini dotata di autonomia politico e di sovranità, la quale non abbia e non eserciti anche rispetto al diritto privato la facoltà di compiere atti con efficaccia giuridica e di valersi delle norme giuridiche. *Nell'esercizio della capacità di diritto privato, rimanendo integra la sua qualità di persona pubblica, lo stato non mette in opera la sua sovranità, ma agisce come un particolare a simiglianza di qualsiasi privato,* e dà origine a rapporti che in nessun modo si puo riuscire a confondere con quelli di diritto pubblico.

Se è necessario che quanto compire nella sfera elevata del potere pubblico vada esente dal giudizio dei tribunali di un altro stato, per impedire che si sovrappongano alla sua sovranità e le rechino offesa, non avviene altrettante per i suoi atti che non sono emanazione della sovranità, ma esplicazione della *natturale e commune attività umana, e possono in egual modo compiersi da qualsiasi individuo capace.* Da essi sorgono rapporti di diritti privato, a cui rimane estranea ogni idea di sovranità. E siffatta loro natura spontaneamente li *assogetta alla giurisdizione dei tribunali di un altro stato nei casi, in cui secondo le loro leggi, possono giudicare su stranieri.* D'altra parte questi tribunali, senza menomare la sovranità dello stato, a cui appartengono, non possono abdicare ad una giurisdizione, che sorge dall 'essenza del rapporto giuridico e dal modo in cui operano i soggetti che v'intervengono.

"E arbitrario supporre che per il solo fatto di conchiudere un contratto con uno stato straniero, il privato implicamente rinunci alla giurisdizione nazionale e si sottoponga a quelle dell'altro contraente." Translation, *post,* p. xii.

8. *Re Commercial Representative of U. S. S. R.,* Court of Cassation, Aug. 3, 1935, Giurisprudenza Italiana, 1935, I. l. 109.

"In tale sentenza, (Governo Rumeno v. Trutta, supra) infatti, fu nettamente precisato che lo Stato estero, in ordine agli *atti compiuti come soggetto di diritto patrimoniali, e che in quanto talinon ne mettono in causa la sovranità, non può invocare la immunità giurisdizionale* che gli é propria per tutti gli atti compiuti nell'esercizio delle sue funzioni sovrane. Lo Stato, per gli atti della prima specie, si mette nelle condizioni di un privato, assoggettandosi come questo anche eventualmente alla giurisdizione dei tribunali di altro Stato, nei casi in cui questi sareb-

bero competenti a giudicare rispetto a stranieri." Translation, *post*, p. xiv.

9. *U. S. S. R.* v. *Chaliapine*, Court of Cassation, Feb. 19, 1929, D. P. 1929 I 73, S 1930 I 49, copied in Niboyet, Les immunités de juridiction, en droit francais, des états étrangers, Révue Gén. Dr. Int. Publ. 1936, 525, 530. The Court of Cassation accepted jurisdiction based on the following consideration:

". . . Attendue que la saisie arrêt contestée a été pratiqué sur la représentation commerciale en France de l'U. S. S. R.; que l'arrêt constate que cette représentation commerciale manifeste son activité commerciale dans tous les domaines; que ces manifestations ne peuvent apparaître que comme des *actes de commerce auxquels le principe de la souveraineté des états demeure complétement étranger.*" Translation, *post*, p. xiv.

10. Court of Cassation, Dec. 15, 1936, 1937, Nouvelle Revue de Droit international privé 568.

11. *Finanzministerium* v. *Dreyfus*, Supreme Court of Switzerland, March 13, 1918, BGE 44 I 49, kk oesterreich.

"Hierbei ergibt sich, dass der fragliche Grundsatz" (der Exterritorialitaet des auslaendischen Staates gegenueber der inlaedischen Gerichtsbarkeit) "des Voelkerrechtes keineswegs als allgemein und vorbehaltlos anerkannt gelten kann. Wohl folgert eine weitverbreitete Lehre aus der voelkerrechtlich vorausgesetzten Souveraenitaet und gegenseitigen Unabhaengigkeit der Staaten, dass ein Staat nicht nur, soweit er in Ausuebung seiner Hoheitsgewalt (iure imperii) handelt, sondern der Regel nach auch, soweit er als Subjekt von Privatrechtsverhaeltnissen (iure gestionis) auftritt, keiner fremden Gerichtsbarkeit untersteht. Dieser Auffassung huldigen ins-

besondere die deutsche und die oesterreichische, sowie auch die franzoesische, englische und nordamerikanische Praxis (vgl. L. v. Praag, Juridiction et Droit international publique, p. 390ff, 400-405). Ihr steht jedoch schon seit 1886 die italienische und seit 1903 die belgische Praxis gegenueber, wonach ein fremder Staat in seiner Eigenschaft als Traeger privater Rechte allgemein gleich einer Privatperson vor dem inlaendischen Richter belangt werden kann (v. Praag, Juridiction et Droit international privé, p. 406, Niemeyers Zeitschrift fuer internationales Privat- und oeffentliches Recht XVI, 1906, p. 243). Und im gleichen Sinne treten den in ihren Laendern herrschenden Meinungen entgegen: France: André Weiss, Dr. int. pr. V. p. 96-115, Germany: Friedrich Stein, Zivilprozessordnung (10. Auflage des Grauppschen Kommentars) p. 16." (Reference to Hamburg Act. II § 1 ziff 5, Annuaire de l'institut XI, 437.) Translation, *post*, p. xv.

12. *Hoffmann* v. *Jiri Dralle*, Supreme Court of Austria.

Decision of May 10, 1950, 1 Ob 167/49 and 1 Ob 171/50, XXIII Entscheidungen des oesterreichischen Obersten Gerichtshofes in Zivil—und Justizverwaltungssachen 1950, p. 304 No. 143.

". . . Diese *Freigabe der acta gestionis an die Jurisdiktion der einzelnen Staaten* ist in der Entwicklung, die die wirtschaftliche Betaetigung der Staaten genommen hat, begruendet. Die klassiche Immunitaetslehre ist in einer Zeit entstanden, da eine jede wirtschaftliche Betaetigung eines Staates im Auslande mit seiner politischen zusammenhing, . . . Einen Unterschied zwischen privaten Rechtsgeschaeften und Souveraenitaetsakten zu machen, war daher nicht gerechtfertigt; ganz anders heute, da die Staaten sich selbt kommerziell betaetigen und mit In-und Auslaendern, wie der vorliegende Streitfall zeigt, im

Wettbewerb stehen. Die klassische Immunitaetslehre hat deshalb heute ihren Sinn verloren und kann daher auch ratione cessante nicht mehr als geltendes Voelkerrecht anerkannt werden." Translation, *post*, p. xv.

13. The rules are: (Spruchrepetitorium No. 28)

I. Auslaendische Staaten sind nach *Voelkerrecht* nur insoweit von der Gerichtsbarkeit der inlaendischen Gerichte eximiert, als es sich um Akte handelt, die sie in Ausuebung der ihnen zustehenden Hoheitsgewalt vorgenommen haben.

II. Auch nach *innerstaatlichem* Recht sind auslaendische Staaten in allen Rechtsstreitigkeiten aus Privatrechtsverhaeltnissen der inlaendischen Gerichtsbarkeit unterworfen. Translation, *post*, p. xvi.

14. In the decision reported RGZ 111, p. 375 (1905), the Supreme Court of Germany held in a case involving a collision that a counterclaim had to be stated on the same material facts as the claim.

15. *Re Italian Government*, Court of Appeals in Hamm, Germany, April 4, 1951, 2 Rechtsprechung zum Wiedergutmachungsrecht, 1951, p. 258.

16. *Re Latvian Legation*, Landgericht Berlin, October 3, 1953, 4 Rechtsprechung zum Wiedergutmachungsrecht, 1953, p. 368.

17. *Re Danish State Railway*, Landgericht in Kiel, Germany, March 19, 1953, Neue Juristische Wochenschrift, 1953, p. 1718.

TRANSLATIONS.

1. Court of Appeals of Ghent, March 14, 1879, Journal de Droit international prive, 1881, p. 82.

". . . This principle (sovereignty of nations) has its value when a government staying within the limits of its governmental mission takes measures which are in the interest of its conservation or which are dictated to it by the general interest, but that ceases to be the question when the government sells guano, and . . . passes acts and enters contracts which at all times and everywhere were considered commercial contracts . . ."

3. Court of Cassation, June 11, 1903.

". . . It is true that the law of nations proclaiming the independence of nations deriving from the principle of their sovereignty is not involved here;— It is true that the sovereignty is only involved through acts of the political life of the State;— It is true that the acts through which the public power affirms itself are governed domestically by the constitutional law and because of the reason of the separation of powers, they escape the control of the courts;— It is true that their results outside of the territory affect only the international law and they are, by this, susceptible only to the consideration of the country itself as well as of other countries;— But it is true that the State does not have to confine itself to its political role; that in view of the needs of the collectivity, it can acquire and possess goods, and enter contracts, it can become creditor and debtor; that it can also trade, can reserve to itself monopolies or the direction of services of general utility;— It is true that acting in this field or in these services, the State does not put in effect its public power, but it does that which

individuals can do, and, throughout, it acts just as a civil or private person;— It is true that when in this quality, it becomes engaged in a dispute, after having acted on the same footing with its contracting partner or it has taken the responsibility of a mistake, foreign to its political capacity, the conflict has for its object a civil right of the exclusive resort of the courts according to the terms of Art. 92 of the constitution;— It is true that the foreign States are, just as civil persons and in the same way as other foreigners under the jurisdiction of Belgian courts;— . . . It is true that if the foreign State comes into our courts to pursue its debtors, it should answer its creditors before these courts."

4. Court of Cassation, Naples, March 27, 1886.

"This system, acquiring authoritative ascendancy from the jurisprudence which is often prone to follow it, arises from an original ambiguity, from which originate all the consequences contrary to the general principles of law. No one can contest that sovereignty and independence of the States is the foundation of international law, nor can there be any doubt that as a consequence of such principle, each State, in the exercise of its powers, is beyond the jurisdiction of other States. But the ambiguity rests in considering the States solely and always as a political entity, since it cannot be denied to it to act as a civil entity, to operate in the sense of acquiring rights and assume obligations in private relationships, similar to a physical or artificial personality capable to exercise civil rights. Therefore the State, heading important interests, must take advantage of all contractual relationships to further the economic activity for commerce by the community of people, considered in their more general relationship. To subject these contractual relations also to the law binding on people means a confusion of different

things and ideas and the pushing of an equitable principle to the most absurd conclusions."

7. Court of Cassation, March 13, 1926.

"Writers and judges have pondered over these arguments and have given an answer. The present notion of State sovereignty recoils from the concept of absolutism furthered by the old doctrine. . . . avoiding the opinion that in the community of nations interdependence is the true status of the States, it becomes necessary to recognize that in some way all the sovereignties are linked reciprocally to each other. The sovereignty of the State exists by itself and not each act performed by a State affects its sovereignty. One cannot allow an explanation of sovereignty when it tends to violate those majestic rights which are reputed essential, among which belongs the jurisdiction over persons operating in the national territory and over choses existing in such territory. Although the State is always eminently a public law entity, in the sphere of internal law as well as in its external relationships of international law, it adds to such capacity that of the civil law, which devolves upon the State through the mere fact of its existence, confirmed by the acknowledgement of its international juridic personality, since it is inconceivable that an association of persons, endowed with political autonomy and sovereign, does not have and fails to exercise, even in relation to private law, those functions tending to the performance of acts having juridic efficacy and to avail itself of the juridic norms. The State, while acting under private law and without detracting from its capacity of public personality, does not employ its sovereignty, but acts as an individual like any other individual, and gives rise to relationships which in no way can be confused with those related to public law. While it is necessary that any action performed in the high sphere of public

domain be foreign to the jurisdiction of the Courts of another State, so as to prevent violations and offense to the sovereignty of the former, the same is not true for those acts which do not arise from sovereignty, but which are an exposition of the natural and common human activity, capable of being performed in a similar manner by any capable individual. Such acts give rise to private law relationships to which any idea of sovereignty is entirely extraneous. This, their nature, spontaneously submits them to the jurisdiction of the Courts of another State in those instances where, according to their laws, judgment may be passed upon aliens. On the other hand, these Courts cannot, without impairing the sovereignty of their State, waive a jurisdiction when it arises from the essence of the juridical relationship and from the manner of acting displayed by the parties appearing before it.

It is arbitrary to assume that an individual, by the mere fact of entering into a contract with a foreign state, implicitly waives national jurisdiction and submits to that of the other party."

8. Court of Cassation, Aug. 3, 1935.

"In this decision (*Roumanian Government* v. *Trutta, supra*) it was clearly established that the foreign State, in line with acts performed under the heading of private law and provided that such acts do not bring its sovereignty into play, cannot invoke jurisdictional immunity to which it is entitled for all acts performed in the exercise of its sovereign functions. The State, for the former acts, appears as a private individual, submitting as the latter even to the jurisdiction of the Courts of another State, where the Courts are competent to pass judgment upon aliens."

9. Court of Cassation, Feb. 19, 1929, D. P. 1929, I 73 S 1930 I 49.

". . . It is true that the contested attachment was served on the commercial representation (representative) of U. S. S. R. in France; that the decision finds that this commercial representation manifests its commercial activity in all fields; that these manifestations can only appear as commercial acts to which the principle of sovereignty of states is completely foreign."

11. Supreme Court of Switzerland, March 13, 1918, BGE 44 I 49 kk oesterreich. *Finanzministerium* v. *Dreyfus.*

"It hereby follows that the principle in question" (of the Extraterritoriality of a foreign state with regard to the domestic jurisdiction) "of the law of nations cannot be looked upon at all as general and without restriction. It is true that a widely recognized doctrine concludes from the sovereignty, presumed in the international law, and from the mutual independence of the states that a state not only in so far as it is acting in the exercise of its public power (*iure imperii*), but also then according to rule when or in so far it shows itself as a subject of relations of private law (*iure gestionis*), is not subject to any foreign jurisdiction. The same opinion is shown in the German and the Austrian as well as the French, the English and the North American practice (compare L. v. Praag, Jurisdiction et Droit international publique, p. 390ff, 400-405). Since 1886 a contrary view has appeared in Italian practice and since 1903 the Belgian practice, according to which a foreign state in its quality as holder of private rights can generally be brought before a domestic judge just as a private individual (v. Praag . . .). And in the same sense are opposed to the opinions

governing in their countries: France: Andre Weiss, Dr. . . ."

12. Supreme Court of Austria; Decision of May 10, 1950.

". . . This release of the *acta gestionis* to the jurisdiction of the different states is founded upon the development of the economic activity of the states. The classical doctrine of immunity originated in an era when every economic activity of a state in a foreign country was connected with its political activity, . . . there was no reason to make a differentiation between acts of a state of a private nature and of governmental; but this is very different today because the states themselves act commercially and compete with their own citizens as well as with foreigners, which is shown in the case at hand. Today the classical doctrine of sovereign immunity has therefore lost its sense and can no longer be recognized as international law presently in force."

13. The rules are (Spruchrepetitorium No. 28):

I. According to international law foreign states are immune from the exercise of jurisdiction of the domestic courts only in so far as acts are involved which they performed in the exercise of the sovereign power that belongs to them.

II. And according to the domestic law foreign states are subject to the domestic jurisdiction for all disputes arising out of relations of a private law nature.

APPENDIX C

Letter from Acting Legal Adviser Jack B. Tate, dated May 19, 1952, to Acting Attorney General Philip B. Perlman (XXVI, Department of State Bulletin, pp. 984-985 (June 23, 1952)).

My dear Mr. Attorney General:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign

immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg. Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and

of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries

in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy.

Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE
Acting Legal Adviser

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 30

THE NATIONAL CITY BANK OF NEW YORK,
Petitioner,

v.

THE REPUBLIC OF CHINA,
Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Plaintiffs.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Plaintiffs.

REPLY BRIEF FOR PETITIONER, THE NATIONAL CITY BANK OF NEW YORK, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Argument of the Respondent Analyzed

The brief for the Respondent is divided into two parts: One part is wholly devoted to arguments why this Court should not make any decision whatever on the issues presented in this case and, by such default, permit the decision of the District Court dismissing the Petitioner's counterclaims to be final (Res. Brief, pp. 1-17). In the second part, arguments presented are on the issues actually involved on this appeal (Res. Brief, pp. 17-42).

That it is the intention of the Respondent to present its case in this Court in this two-fold manner is indicated

clearly by its prayer for relief (Res. Brief, p. 42), as follows: "The writ of certiorari should be dismissed as improvidently granted; or, in the alternative, the order of the Court of Appeals should be affirmed."

This brief of the Petitioner will reply to each of these sets of arguments.

PART I

The writ of certiorari was not improvidently granted.

The Issues Defined

Respondent's first contention is that Petitioner, in opposing Respondent's motion to dismiss its counterclaims, asserted that it had a right to an affirmative judgment, but, after adverse decision on this issue, changed its position in this Court. Petitioner asserts that the issues presented to this Court in its brief and in its petition for writ of certiorari are the same issues argued in the District Court and in the Court of Appeals for the Second Circuit.

These issues, as defined by the Petitioner, may be found in its brief, p. 2, as follows:

> "The question presented is the extent to which a foreign government which institutes an action in the courts of the United States against an American corporation to recover a debt may rely on the doctrine of 'sovereign immunity' to avoid a defense to the action, asserted by way of counterclaim, based on a debt owed by it to the defendant. To take the precise situation which exists in this case: Can a foreign government which has borrowed money from an American bank and is in default on the loan sue the bank for the balance in deposit account and recover a judgment for the entire balance, regardless of its indebtedness to the bank?"

This was the issue which obviously and necessarily was raised when Respondent, by motion, interposed, for the

first time in this case, the plea of sovereign immunity and demanded dismissal of defendant's counterclaims (R. 34).

The Respondent's contention that, in some way, this issue became lost seems to be based upon the three following postulates or assumptions:

1. That Petitioner demanded affirmative relief by its counterclaims (the face amount of each of which is larger than the total amount for which Respondent sues) and argued its right to affirmative relief in the District Court, which decided the motion on that issue. (Res. Brief, pp. 3 (Footnote 4), 5, 6, 15). It has now changed its position.

2. That the Petitioner's efforts to make clear, after the plea of sovereign immunity had been raised, that the counterclaims should be considered as set-offs, and were pleaded to defeat the Respondent's suit against it, should cause the Court to treat them as defenses only, and that the dismissal of an affirmative defense is not a final order (Res. Brief, pp. 3, 4, 5, 6) and therefore not properly before this Court.

3. That Petitioner "conceded" the counterclaims dealt with public or governmental functions and that a sovereign performing governmental functions was entitled to governmental immunity as requested by Respondent (Res. Brief, pp. 3, 10, 13).

Seeking to establish these three propositions, the Respondent finds what it believes to be the residual propositions which remain in this case, and declares that these are the questions which the Court should consider if it considers any. This substitute issue, as framed by Respondent, may be found on page 6 of its brief.

Position in Lower Courts

Petitioner's position before the lower courts has never changed. It was that the plea of sovereign immunity interposed by motion limited the recovery of its counterclaims to the amount of any recovery by Respondent

against it. This is borne out by the facts of the case, the written memoranda filed with the courts, and the decisions of those courts.

This Court cannot know what was in the briefs of the Petitioner presented to the lower courts and, since the Respondent has made allegations outside of the record as to the position of the Petitioner before these courts, it seems proper to reproduce exactly the written statements made by the Petitioner to the District Court setting forth its position. The briefs here referred to are filed in the District Court for the Southern District of New York, file No. C. 66-177.

The Petitioner's brief in opposition to Respondent's (plaintiff's) motion to dismiss its counterclaim states at p. 11:

> "This court and other Federal courts and State courts have granted counterclaims, the recovery on which to the defendant asserting the counterclaim has been to the limit for which offset was possible."

The Petitioner's Point III, on p. 20, was designated "Right to Offset by Reason of its Banker's Lien." The argument contained in this point was specifically mentioned in the decision of the lower court, which stated:

> "An additional argument that the defendant has a right to make its debit by reasons of a banker's lien has no validity in this context."

Such a remark could, of course, have related only to the counterclaims and certainly judicial recognition of the right to assert a banker's lien could not result in an "affirmative" judgment (R. 40).

On January 22, 1953, the Petitioner moved for reargument and for leave to amend the counterclaims. There were several purposes, as set forth in the Notice of Motion (R. 46). Among them was to designate the counterclaims as "set-offs" in order to make it wholly clear that they were limited to any recovery by the Respondent. The

Respondent refers to that motion in a footnote (Res. Brief, p. 4, footnote 5) stating that Petitioner, in its motion for reargument "had attempted once more to sustain the counterclaims demanding affirmative relief" citing the record (pp. 46-49), which is the printed copy of the defendant's motion. On this motion the Petitioner restated its position and in its specification covering this point it said, p. 20:

> "The defendant claims only that its counterclaims should be effective up to the amount of any recovery which this Court shall hereafter find. . . ."

The position of the Petitioner (defendant) in the Court of Appeals remained the same, and continuously throughout its brief Petitioner defined its position. One reference will show conclusively what it was.

> "'Counterclaim' as here used will mean counterclaim as against a sovereign. Appellant concedes such a counterclaim is limited to an amount which could be set off against any recovery by the sovereign and to that extent has no more effect than an equitable defense as against the sovereign's recovery." (Appellant's brief filed in the office of the clerk, Court of Appeals for the Second Circuit, p. 10.)

Also, on p. 30 of that same brief, Petitioner had a subheading "The Counterclaims Are Available as Equitable Set-Offs or 'Banker's Liens'" which indicated clearly the continuity of its argument in the lower court, *supra*.

The opinion of the Court of Appeals took cognizance of the position of the Petitioner on this point for the Court said (R. 67):

> "For the purposes of this appeal we shall consider the counterclaims as if they had been further amended in the manner thus proposed by defendant."

Further on in its opinion the Court of Appeals again referred to "defenses by way of set-off and of counterclaim," (R. 67) and in referring to one of the conclusions of the lower court said:

> "We reach the same result if we regard the counterclaims but as set-offs." (R. pp. 67-68)

The decision of neither the District Court nor the Court of Appeals contains any indication that the counterclaims were dismissed because they were in the usual form of counterclaims demanding affirmative relief. This cannot be an oversight by the courts as both decisions are explicit as to the bases on which the court acted.

Form of the Counterclaims

The Petitioner (defendant) pleaded these claims as "counterclaims" and not as "defenses" because, under Rule 13 of the Federal Rules, it was the only way in which they could be pleaded (Res. Brief, p. 4). It would have been an incomplete and improper pleading if defendant had merely stated that the obligation of the plaintiff to it was equal to or exceeded the plaintiff's claim. Also, it must be remembered that the plea of sovereign immunity had not been raised by the Respondent when the counterclaims were pleaded.

In *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter*, 32 F. 2d 195 (2d Cir. 1929), a case in which this Petitioner had originally been one of the parties, judgment on a counterclaim had been entered against a sovereign entity which had at that time interposed no objection. When, however, one of the defendants, Dexter & Carpenter, which had interposed the counterclaim, attempted to collect the judgment out of the funds of the sovereign, sovereign immunity was immediately claimed. Judge Swan said in that case, at p. 200:

> ". . . the court presumptively has jurisdiction and may proceed unless the sovereign objects."

It is not necessary or even proper for defendant to anticipate that the plea of sovereign immunity will be raised. Unless it is raised, the Court must treat the sovereign as any other litigant. *Ex Parte Republic of Peru*, 318 U. S. 578; *Compania Espanola De Navegacion Maritima, S. A.* v. *The Navemar et al.*, 303 U. S. 68; *Mexico* v. *Hoffman*, 324 U. S. 38.

When the plea of sovereign immunity was raised in this case, the Petitioner recognized that this limited its counterclaims to the amount of Respondent's recovery. Its position has never been otherwise. The full amount of the counterclaims must be before the Court even though the plea of sovereign immunity has been interposed. This has been clearly stated by one court which held (*State of Russia* v. *Bankers Trust Company*, 4 F. Supp. 417, 420, aff'd 83 F. 2d 236):

> "The offset must therefore be allowed, and this involves a determination of the amount of it. Injustice to the defendant would be prevented by merely finding that the offset is sufficient to defeat the plaintiff's recovery, but equity ought not to leave the adjudication incomplete. There should be a determination of the exact amount due to the National City Bank, without, of course, any direction that the plaintiff pay the excess or that it be subject to a judgment for the excess."

The experience of this Petitioner in that very case is ample to justify the form of the counterclaims.

Even if the form of the counterclaims were incorrect, (which Petitioner does not concede) or if Petitioner had in fact asked for affirmative judgment after plea of sovereign immunity (which most definitely it had not), the proper treatment would have been as indicated in the *State of Russia* case, namely, to limit the amount of judgment possible on the counterclaims to any recovery of the plaintiff.

This has more recently been done in the case of *Hungarian Peoples Republic* v. *Cecil Associates*, 118 F. Supp. 954.[1] There a sovereign government had leased an entire building, but left the building before the expiration of the term. It sued the owner of the building to recover a deposit of $9,000 given to the landlord by the government to secure the latter's performance of its obligations under

[1] *Cf. Republic of China* v. *Pang-Tsu Mow*, 105 F. Supp. 411 (D. C. 1952); and *U. S.* v. *Laney*, 96 F. Supp. 482 (S. C. 1951).

the lease. The defendants insisted upon an affirmative judgment even after the plea of sovereign immunity had been interposed by a motion to dismiss. But the court, finding the counterclaims properly interposed, stated, in deciding the plaintiff's motion to dismiss them on the grounds of sovereign immunity, that the sovereign "cannot be heard to plead immunity against the granting to the defendants, by way of set-off, of relief at least to the extent to which the plaintiff seeks affirmative judgment."

There can be no doubt that both the District Court and the Court of Appeals decided the instant case on the understanding that the counterclaims were intended to serve only as set-offs and were limited to the amount of plaintiff's claim.

The Respondent, in effect, argues that, because the counterclaims were framed in accordance with Rule 13 of the Federal Rules and in accordance with decisions in previous cases to which the Petitioner was a party and before the plea of sovereign immunity had been interposed, the Petitioner cannot secure any relief, even that to which it may be entitled. On that theory, if a plaintiff (or a defendant pleading an affirmative counterclaim) has demanded more than the amount to which the Court at the end of the case finds it was entitled, the Court cannot render judgment for the amount found to be due, but must dismiss the whole complaint (or counterclaim) because the pleader has asked too much. There is no such rule in our system of jurisprudence.

The Alleged "Concession" of Petitioner

It remains to say a word about the alleged concession of the Petitioner that the counterclaims dealt with public or governmental functions, and that a sovereign is immune from any such claims. The logical end of this argument would be that no counterclaims in any amount or for any purpose could be pleaded against a sovereign, since every act which a sovereign does is a sovereign act. Petitioner

does not contend that for a sovereign to borrow money in the United States or from American institutions is wrongful, or is outside of the authority of the Government. Its act must be a governmental act or it could not be performed at all. It is true that, from some acts, a sovereign is immune as to any loss or damage which it may cause another. But it does not enjoy immunity for many of its acts, and particularly for those which it commits as an alien within the borders of another friendly country, or when dealing with a corporate entity of that friendly country.

The Respondent also says that the issue here relates to "public funds." This is a mere term. With even greater justice the case can be said to relate to the funds of The National City Bank of New York. The argument, it is believed, is not furthered by these mere characterizations.

Other Irrelevant Matters in Respondent's Brief

Only one other matter in Respondent's brief, extraneous to the main issue before this Court, needs to be dealt with. This relates to the peculiar significance and interpretation which Respondent places on Section 25(b) of the Federal Reserve Act, as amended.

The *ex parte* proceedings under that Act are solely to enable an entity, such as the Respondent government, to make demand for bank accounts through agents, designated at its request by the Department of State. There is no issue whatever concerning the meaning, interpretation or application of 25(b) before this Court.

Reference to Section 25(b) of the Federal Reserve Act, other than the paragraph conferring jurisdiction, was intentionally omitted by the Petitioner because it is completely irrelevant. That section was enacted during the war (1941), as stated at the time, to enable governments and central banks to have use of their own funds in a situation where, by reason of the disruption caused by

the war, the persons authorized to sign on these accounts for the government or central bank had been captured, killed or had disappeared. Payment from the account of any juridical entity to a person not authorized to receive it for the use of that entity naturally is not a discharge to the bank for such payment; and so, quite properly, the law provides that any payments made to these designated agents shall "constitute a complete discharge and release of any liability of such bank for or with respect to such property."

There is nothing in the statute which purports to compel the bank receiving such a certification to make payment. The certificate of the Secretary of State is not a determination of property rights nor can it be, since that would mean that the Secretary of State had assumed judicial functions and, solely on the representation of one interested party, had determined all legal controversies between a foreign government and a domestic bank, leaving the courts only the privilege and the obligation of enforcing such an executive determination.

The suggestion in Respondent's brief (p. 11) that Congress, in enacting such a statute, should enumerate the defenses to such a claim which may be availed of by the bank, does not require comment.

PART II

Replying to respondent's arguments on the issues.

I. Respondent's Point II: "A counterclaim arising from transactions extrinsic to that out of which the primary claim arose is the equivalent of an independent suit against the sovereign which may not be sued without its consent."

First of all it must be absolutely clear that the Republic of China has no jurisdiction within the territory of the United States or power to limit jurisdiction of American courts. Respondent several times (Res. Brief, pp. 17, 28

and 29) implies that only by the consent of the Republic of China, can this Court acquire jurisdiction to consider issues in a suit against the Respondent or even a counterclaim in a suit brought by it. This is not the law. The United States has jurisdiction over everything and everyone within its boundaries, and only under special circumstances will it refrain from exercising that prerogative. Nothing The Republic of China can say or do is controlling upon our courts as to their jurisdiction. As Chief Justice Marshall said:[1]

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

Furthermore it must be noted that Respondent has been inconsistent in its jurisdictional argument. In the District Court, Respondent asked that the counterclaims be dismissed on the grounds "that the Court lacks jurisdiction thereof." In this Court Respondent admits that the jurisdiction exists (Res. Brief, pp. 27-28) but argues that Respondent itself has somehow destroyed that jurisdiction by its refusal to consent. Either the court has jurisdiction or it has not. And if it has, as previously stated, nothing The Republic of China could do will alter that fact.

Of course The Republic of China might influence the court as to the exercise of jurisdiction. It may ask the court to give validity and substance to its plea of sovereign immunity, as it has done in this case. But there is a vast difference between the *possession* of jurisdiction and its *exercise*. Respondent seems to have confused these concepts. For example, it is noted (Res. Brief, p. 30):

> ". . . The doctrine that a court will not *exercise* jurisdiction over a foreign sovereign existed long

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[1] *Schooner Exchange* v. *McFadden*, 7 Cranch 116, 136.

> before the Federal Rules were promulgated, and by virtue of Rule 82 nothing in the Rules may be relied upon to affect the *exercise* of the Court's jurisdiction." (Emphasis added.)

There is positively no mention in Rule 82 of the extent to which a federal court should exercise its jurisdiction. The Rule states:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein . . ."

In Point II, as throughout the remainder of its brief, Respondent relies heavily upon the Draft Convention of Courts in regard to Foreign States, American Journal of International Law, 32 Vol. 26, Supp., referred to in the Respondent's brief on pages 12, 15, 26, 27, 32, 39 and 40 as the Harvard Draft Convention. The Petitioner agrees that much weight may properly be given to the impersonal, disinterested legal research at our great institutions of learning, even though not binding on this Court.[1]

Respondent argues that the Harvard Draft Convention would not permit a set-off as requested here by the Petitioner; but it is not at all clear that Article 6 of the Draft Convention should be so interpreted, particularly in view of the careful distinction made as to those acts for which a sovereign should or should not enjoy immunity.

Such a work would be more persuasive if it were current. This Draft Convention was promulgated in 1932. The twenty-two years which have elapsed since this code was suggested, were studded with cataclysmic events

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[1] The only Convention on this subject which has had international effect is the Brussels Convention of 1926 which drastically restricted the doctrine of sovereign immunity in admiralty matters. The signatories bound thereby do not include the United States; but the United States has never claimed sovereign immunity as to its own merchant vessels. International Convention for the Unification of Certain Rules Concerning the Immunities of Government Vessels, signed at Brussels, April 10, 1926: Treaty Information Bull. No. 18 at 67 (U. S. Dep't State 1931).

which have changed many concepts in this world, not the least of which is the concept of Government. Fortunately, the great work on research in legal thinking has been continued at Harvard and other institutions of learning. Later studies, because of greater timeliness, should have greater weight. Petitioner will refer but to three: the studies appearing in the Yale Law Journal, June 1954, in the American Journal of International Law (47 Am. J. Int. L. 93) and in the Harvard Law Review (67 Harv. L. Rev. 608, 1953-4). In the first mentioned may be found the following statements, p. 1165:

> "For acts within United States territory, a foreign government should enjoy no greater freedom from suit in United States courts than does the federal government.* If a foreign state chooses to act within the United States, it seems not unfair to require it to abide by American policy as embodied in various statutes restricting immunity. . . ."**

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* "This limitation upon foreign sovereign immunity would represent no startling innovation. One of the early American decisions granting immunity was based upon the idea of assimilating the foreign state to the domestic state. *Long* v. *The Tampico*, 16 Fed. 491, 495 (S. D. N. Y. 1883). And a recent case reemphasized this idea. 'In the absence of statute or treaty, no sound principle of law or of international comity requires that the courts of this country treat a foreign government more favorably as to sovereign immunity than our own Government is treated by the courts.' *The Beaton Park*, 65 F. Supp. 211, 212 (W. D. Wash. 1946). See also *Lauterpacht, supra* note 92, at 226."

** "On the contrary, the unfairness lies in allowing the foreign state to remain above the local law while the domestic state and all its citizens are subject to that law. This principle was recognized in Article 11 of the Harvard Research, 26 Am. J. Int'l. 451 (Supp. 1932), which proposed that: 'A State may be made a respondent in a proceeding in a court of another State when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage . . .' *Id.* at 597. Reform based on the assimilation of the foreign state to the local state seems in the offing. 'Public opinion and practical considerations do not permit too wide a gap between the law, which many regard as increasingly artificial, unjust, and archaic, relating to the immunities of foreign states.' *Lauterpacht, supra* note 92, at 221."

The second study is devoted to an examination of the letter by our own Department of State setting forth the restrictive theory of sovereign immunity. This letter, sometimes referred to as the Tate Letter from the name of the person who signed it, is reproduced in the Petitioner's brief, Appendix B.

At page 32 of its brief Respondent states that it is significant that petitioner has not cited one authoritative decision which has allowed a permissive counterclaim or set-off against a sovereign without its consent thereto. Petitioner might, with equal force, reply that it is even more significant that the Respondent has not cited any decision of this Court which holds that a counterclaim against a friendly foreign sovereign must be limited to the subject matter of the action. Respondent does seem to rely on the case of *Bull* v. *The United States*, 295 U. S. 247 (Res. Brief, p. 23), but that case had nothing to do with the scope of counterclaim or kind or type of counterclaim to be permitted against a sovereign. The *Bull* case involved a recoupment which by definition must arise out of the same transaction as the subject matter of the suit. The holding of that case is in no way authority for restricting the scope of a counterclaim to the limits required in recoupment. In fact, the word "counterclaim" is not even mentioned in the case. This is fully discussed in Petitioner's Brief on page 19 *et seq.*

The Petitioner seriously questions Respondent's interpretation and application of *"United States* v. *Ringold"* 8 Peters 150 (Res. Brief, p. 23; discussed Petitioner's Brief, p. 19). The Respondent here attempts to detract from the broad language of that case by saying: "the defendant had the benefit of the specific statutory consent of the Government which permits setoffs of any kind whether or not related to the main suits," and for proof that the United States had given it "explicit consent" cites the Act of March 3, 1797, Sess. II, Ch XX. The statue, however, does not define the scope of counterclaims to be allowed against the United States. Only

through judicial construction was a broad, liberal counterclaim permitted under this statute.[1] It seems paradoxical that the United States does not have the immunity within its own courts now sought by The Republic of China here. The extent of immunity granted to the United States through its judiciary can properly be used as a criterion for the treatment of friendly sovereign litigants in our courts.

Throughout its brief (Res. Brief, pp. 12, 24, 41) Respondent contends that only Congress may restrict the immunity of a friendly foreign sovereign. But there has never been an act of Congress granting immunity to foreign sovereigns in the courts of this country. Such immunity as they enjoy derives from court decisions. In fact, the Respondent wholly relies upon such a decision as establishing sovereign immunity in this country (*Schooner Exchange* v. *McFadden*, 7 Cranch 116, Res. Brief, p. 17). Obviously this Court has the power to interpret its own decisions, and it has stated on more than one occasion that it has the authority to determine the question of sovereign immunity. *The Navemar*, 303 U. S. 68; *Ex Parte Peru*, 318 U. S. 578.

II. Respondent's Point IV: "The plea of sovereign immunity to the counterclaims is not in conflict with the suggested change in policy of the State Department to restrict the doctrine of sovereign immunity to activities connected with public or governmental acts. Furthermore, a shift in policy by the executive department cannot control the courts."

On page 36 of its brief Respondent says:

> "The doctrine of sovereign immunity is too deeply embedded in our law to be uprooted by judicial decision."

Upon close examination however the immunity of a friendly foreign sovereign is not "deeply embedded" in

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[1] *United States* v. *Wilkins*, 6 Wheat. 137, 144.

our law. The only field of law in which this Court has had occasion to deal with the subject of foreign sovereign litigants has been in admiralty. Since heretofore this Court has not had before it the problem of sovereign immunity in other aspects, it is proper to consider what the courts of other nations have done to define international law on this subject. As Chief Justice Marshall stated:

> ". . . This law [international law is meant] is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." (*Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch 191, 198 (1815).)

A survey of the judicial decisions of other nations, whether civil or common law, indicates that many have adopted the restrictive theory of sovereign immunity. And furthermore it is not the purpose for which the sovereign acts which is determinitive, but the nature of the act itself. The doctrine of restrictive sovereign immunity does not deprive the sovereign of its dignity or its sovereignty. When it is acting as only a sovereign government can act, it is immune. On the other hand, when it transacts business within the territory of another country, when it enters into commercial relations with foreign persons and corporations, when it voluntarily incurs money obligations, it is acting as any person or private corporation. When it is a debtor to an American corporation, it should be treated as such. The fact that the obligations are "Treasury notes" is but a way of defining the written evidence of the sovereign's debt.

Our own State Department, in formulating its policy, has pointed to the actions of foreign courts and in some of their decisions we find that a sovereign which has made a contract to purchase bullets for its army, shoe soles for its soldiers, or has borrowed money for any purpose whatever, was not granted immunity (Petitioner's main brief, pp. 37-42). The Respondent is clearly wrong in implying that, if the United States were to go abroad (Res. Brief, p. 24) and do business with foreign corporations, incur obligations, including the borrowing of money, it could plead and be protected by the plea of sovereign immunity in that country. Positively it could not in many of the courts of Europe. In most of them, if it submitted itself as a plaintiff, it would have to meet any available counterclaims (Pet. Brief, p. 8, Appendix B).

In 1952, when the State Department issued its policy statement, Mr. Tate said in his letter:

> "It is thus evident that, with the possible exception of the United Kingdom, little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity."

Since 1952 even Great Britain has started to abandon the absolute theory.[1] The English doctrine now appears to be in a state of flux. In 1952, an Interdepartmental Committee on State Immunities, appointed by the government, declared itself unable to establish the "exact position under international law" because of the great divergence in state practice.[2] In *Compagnia Naviera Vascon-*

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[1] In Great Britain as well it seems that the decisions of the higher courts almost all embraced vessel cases.

[2] Quoted from Michael Brandon, Sovereign Immunity of Government Owned Corporations and Ships, 39 Cornell Law Quarterly 425, 449. In England, a Certificate of the Foreign Office relates only "to questions of fact or status and not to law", stating "whether the foreign state, or entity is recognized by H. M. Government as being entitled to diplomatic status in England. The legal conclusions are drawn by the court".

gado v. *Cristina S. S.* (All. E. R. 19, 1938), the first case before the highest judicial body in England, immunity was granted to a vessel engaged in trade but owned by a foreign government. However, three of the Lords declared their disagreement. In *Sultan of Johore* v. *Abubakar* (All. E. R. 1261, P. C., 1952), the Privy Council took the opportunity to observe "that in the absence of distinguishing facts, the absolute immunity doctrine still applies as far as the Court of Appeals, but that the House of Lords has not yet pronounced on the matter."[1]

Regardless of whether Great Britain now follows the absolute or restrictive theory of sovereign immunity, it should be pointed out that the courts of Great Britain have long permitted broad counterclaims to be asserted against friendly foreign sovereigns. This is clearly demonstrated in *Strousberg* v. *Republic of Costa Rica* (Chancery Division Weekly Reporter Vol. XXIX, 1880-81 p. 125), where it is stated:

> ". . . It is a violation of the respect due to a foreign Sovereign or State to issue the process of our courts against such Sovereign or State. There is but one exception, if it can be called an exception, to the rule, and that is where foreign Sovereign or State comes into the courts of this country for the purpose of obtaining some remedy; then by way of defence to that proceeding, the person sued here may file a cross-claim against that Sovereign or State for enabling complete justice to be done between them. The defendant in that case is, in fact, only giving to the foreign Sovereign's attorney or solicitor notice of the proceedings—for that is, in substance, what it comes to—so as to bring in whatever defence or counter-claim there might be as a set-off. . . ."

Petitioner has consistently maintained that the counterclaims were erroneously dismissed without reference to either the absolute or restrictive theory of immunity.

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[1] Compare article by Michael Brandon, *supra*.

III. In reply to Respondent's Conclusion.

Respondent expresses a fear that if immunity is not granted in this case, the sovereign will be harassed by the assertion of defaulted notes as counterclaims whenever it comes into court. The suggestion that a bank might buy up defaulted notes is irrelevant here. There is complete privity between the parties. Furthermore these notes were purchased for full value.

Good faith and honor underlie every business relationship. It would be unfortunate if these fundamental concepts should have a special meaning when they apply to foreign sovereigns.

The Republic of China, as any other sovereign appearing as voluntary litigant in our courts, is amenable to the laws of the United States. If it enters these courts to collect a debt it is presumed that it seeks a just and equitable determination of the controversy between it and the institution it sues. But here it seeks an exemption from consideration by the court of circumstances which would defeat its claim. Thus, the Respondent seeks not a determination of the rights of the parties before it, but rather the recognition and enforcement of a vested interest in that "hoary doctrine" of absolute sovereign immunity.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, ~~1953.~~ 54

No. ~~[redacted]~~ 30

THE REPUBLIC OF CHINA,
Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Defendants,

v.

THE NATIONAL CITY BANK OF NEW YORK,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 612.

THE REPUBLIC OF CHINA,

Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,

Defendants,

v.

THE NATIONAL CITY BANK OF NEW YORK,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court for the Southern District of New York (R. 35) is reported in 108 F. Supp. 766, and its opinion denying reargument and leave to amend (R. 55) in 14 F. R. D. 186. The opinion of the Court of Appeals for the Second Circuit (R. 64) is reported in 208 F(2) 627.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on December 8, 1953 (R. 72). The petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1251(1).

Question Presented.

Actually, none of the questions which the petition sets forth is presented by the pleadings in this case. Petitioner's amended answer pleads not "set-offs" but "counterclaims" which demand affirmative judgment against The Nationalist Government of The Republic of China based on alleged transactions connected with public or governmental activity, as distinguished from private or commercial acts.

Petitioner seeks to have this Court review, not the amended pleading which it served and filed, but a proposed further amended pleading which it never served and filed because the lower court refused petitioner permission to make the further amendment and its decision was not disturbed by the Court of Appeals.

What the lower court dismissed were not "set-offs", but were full "counterclaims" pleaded by petitioner demanding affirmative judgment against The Nationalist Government of The Republic of China in the total amount of $1,634,432.00, with interest and costs (R. 23-27, 36, 41). Since petitioner concedes it is not entitled to affirmative judgment in any amount against the sovereign, The Republic of China (Petitioner's brief, p. 2), there can be no question concerning the propriety of the lower court's action

in dismissing the counterclaims wherein such admitted unauthorized relief was demanded.

It is true that petitioner after dismissal of the counterclaims by final order of the lower court moved for reargument and for permission to submit a further amendment of its answer (R. 46). But the amendment sought was to plead set-offs "also" and "in addition to" (R. 47) the pleaded counterclaims demanding affirmative judgment. Moreover, the motion was denied by order of the lower court as untimely (R. 55, 57) and the Court of Appeals, on appeal therefrom by petitioner (R. 58), affirmed this order as well as the previous final order dismissing the pleaded counterclaims (R. 72). Because the Court of Appeals in its opinion declared it would reach "the same result if we regard the counterclaims as but set-offs" (R. 67-68), in no way alters the fact that they have never been pleaded as set-offs and that the final order and judgment, affirmed by the Court of Appeals and which this Court is asked to review, dismisses not set-offs but counterclaims demanding affirmative judgment which petitioner acknowledges were improper.

For the remainder of this brief, however, we shall assume *arguendo,* as apparently petitioner has done, that dismissal of "set-offs", rather than of counterclaims demanding affirmative judgment, is here involved. We submit, however, that the cause still would not be one for certiorari, since, contrary to petitioner's assertions, there is no confusion in this field of law; all authoritative decisions have consistently restricted "set-offs" against a foreign sovereign plaintiff to those related to the subject matter of the main suit. Neither is there any conflict with State Department views.

Statement.

Respondent, The Nationalist Government of The Republic of China, is one of several plaintiffs* which has brought suit against the petitioner, The National City Bank of New York, to recover $200,000 deposited at its New York City branch.

The Secretary of State, pursuant to Section 25(b) of the Federal Reserve Act, has certified to petitioner that the deposit in question belongs to respondent (R. 8, 11).

Although the express provisions of Section 25(b) exonerate petitioner from all further liability once it honors the certification made by the Secretary of State, petitioner refused to comply with the certificate, but instead asserted that there were other adverse claims to the bank deposit in question, obviously made on behalf of the Communist Government of China which is not recognized by the United States. On that basis, petitioner succeeded in staying respondent's suit for one year in order to give notice, pursuant to New York Civil Practice Act §51-a, to the alleged adverse claimants in Peking and in Shanghai, China, advising them that unless they brought suit on the deposit in question before the one-year stay expired, their causes of action would be time-barred in N. Y. under that statute.

On March 7, 1952, before the one-year stay expired, petitioner served its answer, wherein no counterclaim or set-off of any kind was pleaded.

After the one-year stay had been obtained and the notice had been served on the alleged adverse claimants repre-

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* The other plaintiffs are the agency of respondent, the Shanghai-Nanking Railway Administration, in whose name the account was opened, and the two directors of that agency, Moh Han and Sau Chen, who have been certified by the State Department pursuant to §25b of the Federal Reserve Act (12 U. S. C. §632) as possessing authority to receive the funds for that agency on behalf of respondent, The Republic of China.

senting the Communist regime, a separate suit was actually started against petitioner in the Southern District by the Communist Government of China, particularly the Nanking-Shanghai Railway Administration, K. F. Mok and Y. T. Yu (Civ. No. 77-1/1952). However, on December 3, 1952, petitioner entered into a stipulation permitting those alleged adverse claimants to discontinue the suit, the stipulation reciting that the parties were remitted to such rights, powers, privileges and immunities as each may have in respect to the other as though the suit had not been commenced.

On July 11, 1952, prior to the signing of that stipulation, petitioner served an amended answer herein setting forth two counterclaims solely "against plaintiff, The Republic of China" (R. 23, 25), and it specifically alleged as part of these counterclaims that "The plaintiff, The Republic of China, is, and it all times hereinafter mentioned was a sovereign government recognized as such by the duly appointed Executive Department of the Government of the United States" (R. 23, 25).

Both of the counterclaims arose out of transactions completely unrelated to the bank deposit for which respondent sues.

The first counterclaim was based on a note, allegedly given in 1920 by respondent to J. P. Morgan & Co. (R. 24), not a party to this litigation.

Its second counterclaim was based on Treasury Notes allegedly given by respondent to the Shanghai foreign branch of petitioner in 1947 and in 1948 payable at The Central Bank of China (R. 25).

The amended answer based on these counterclaims sought affirmative judgment against respondent, The Republic of China, in the amount of $1,634,432.00, with interest and costs (R. 26-27).

Respondent's motion to dismiss the counterclaims (R. 34) was granted with an opinion by the lower court (R. 35, 41). Petitioner's subsequent motion for reargument and for leave to further amend its answer (R. 46) was denied also with an opinion by the lower court (R. 55, 57). On appeal taken by petitioner from both orders (R. 42, 58), the Court of Appeals for the Second Circuit in an unanimous opinion (R. 64) affirmed both orders (R. 72).

I.

Petitioner does not cite one authoritative decision which supports its contention that the Court of Appeals erred "in holding that a right of counterclaim (set-off) against a foreign sovereign is limited to the 'subject matter of the suit';" (Petitioner's brief, p. 10). Although when a sovereign sues "it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter*" (*U. S.* v. *The Thelka,* 266 U. S. 328, 339-340), it has consistently been held that where the alleged set-off is unrelated to the subject matter of the action, the sovereign plaintiff remains immune. *Re Monongahela Rye Liquors,* 141 F(2) 864 (3rd Cir., 1944); *Republic of China* v. *American Express Co.,* 195 F(2) 230 (2 Cir., 1952); *In re Greenstreet, Inc.,* 209 F(2) 660 (7th Cir., 1954), and cases cited therein.

Petitioner makes the unfounded statement that some confusion exists in this field of law, citing the lower court decisions of *The Gloria, The Thelka, The F. J. Luckenbach, Kingdom of Norway* v. *Federal Sugar Refining Co.,* 286 Fed. 188 (S. D. N. Y.) and *State of Russia* v. *Bankers Trust Co.,* 4 F. Supp. 417 (S. D. N. Y.) (Petitioner's brief, pp. 15-16). However petitioner fails to state that appeals were taken in both of these cases and that the higher courts followed the principle of law again recognized in

the present case, that only set-offs related to the main suit may be pleaded against a sovereign plaintiff.

The Gloria, The Thelka, etc. v. *Federal Sugar Refining Co.*, 286 Fed. 188, cited by petitioner, resulted in questions being certified by the Court of Appeals for the Second Circuit in 295 Fed. 1020, and in the questions being answered by this Court in 266 U. S. 328 (1924). This is the same *Thelka* case which has frequently been cited, and referred to on page 6 of this brief, for the proposition that, when a sovereign sues in our courts to enforce a claim, "it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter.*" 266 U. S. 328, 339-340.

State of Russia v. *Bankers Trust Company*, 4 F. Supp. 417, cited by petitioner, was affirmed *sub nom. United States* v. *National City Bank of New York*, 83 F(2) 236 (2 Cir.), cert. denied 299 U. S. 563 (1936), in which the Court of Appeals rejected the lower court's reasoning and affirmed solely on the ground that the set-off was related to the main suit.

II.

We submit that an asserted change in policy of the Department of State set forth in a letter by its acting legal adviser cannot be relied upon to upset well established principles of law dealing with sovereign immunity. Indeed, this is admitted in the letter itself, which concludes (next to last paragraph):

> "It is realized that a shift in policy by the executive cannot control the courts. . ."

Even treating this letter as somewhat persuasive, although not binding, upon the Court, it does not purport

to abrogate the doctrine that a sovereign is immune from suit; it seeks only to restrict that doctrine to activities connected with public or governmental functions, as distinguished from private or commercial acts.

If we accept the so-called trend or shift of policy expressed in this letter, it is still necessary to determine whether the claim of immunity is one connected with commercial endeavors or one connected with public or governmental functions. If the plea of immunity relates to a public or governmental transaction, all are agreed that the immunity should be recognized.

Here, the counterclaims against which the plea of sovereign immunity has been sustained, clearly fall within this more limited concept. What could be considered more "governmental" or "public" in nature than the fiscal operations of a sovereign and the bonds or other obligations it issues to raise revenue upon which its very existence depends. Indeed, in its brief to the Court of Appeals petitioner admitted that the obligations alleged in both counterclaims represented loans for "economic" rehabilitation in China, and it conceded in its oral argument that, even within the restricted views of the State Department as expressed in this letter, respondent would be entitled to plead sovereign immunity to the causes of actions alleged in the counterclaims. This appears from the opinion of the Court of Appeals itself, where it said (R. 68):

> "Defendant, as we understand it, does not argue that this new trend, if adopted by our courts, would here serve to deprive plaintiff of its sovereign immunity."

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent
The Republic of China.

April 7, 1954.

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THE REPUBLIC OF CHINA,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

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IN THE

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No. 30.

THE NATIONAL CITY BANK OF NEW YORK,
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THE REPUBLIC OF CHINA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

STATUTES INVOLVED.

Although petitioner's brief under this heading refers to Section 25-b of the Federal Reserve Act (Title 12, U. S. C. Section 632), the appendix does not set forth the pertinent text of that section but is limited to the first paragraph thereof.

The suit brought by respondent, the National Government of the Republic of China, is to recover a deposit of $200,000 wrongfully withheld by petitioner, The National City Bank of New York, which deposit has been certified by the Department of State, pursuant to the fourth and last paragraphs of Section 25-b of the Act, as belonging to respondent (R. 4-10). That respondent's suit followed

only after petitioner ignored the Secretary of State's certification and that respondent's suit is based on Section 25-b of the Act, is omitted from petitioner's brief, as is the relevant text of that section. Section 25-b of the Act, without limiting in any respect a foreign sovereign's immunity, vests exclusive jurisdiction in the federal courts of a suit by a foreign sovereign against a bank involving bank deposits certified by the Secretary of State as belonging to the foreign sovereign.

We set forth verbatim in the Appendix *infra*, the pertinent text of Section 25-b of the Federal Reserve Act (Title 12, U. S. C. Section 632).

Question Presented.

The abstract question which petitioner poses is not the question presented for review in the terms and circumstances of the case.

This Court should not render what is tantamount to an advisory opinion or general discussion[1] on the extent to which a foreign government which institutes an action in the courts of the United States may rely on the doctrine of sovereign immunity as a defense to counterclaims pleaded against it.

Because this Court will not tolerate suitors maintaining positions here which conflict with those taken below[2], the question before the Court must be viewed in conjunction with the position which petitioner assumed in the Court of Appeals as well as in the District Court.

---

[1] This is particularly so in cases involving a sovereign and international law. "In matters of such grave importance as those involving questions of international law it seems to me very expedient that Courts should refrain from expressing opinions which are beside the question actually to be decided." *Compania Naviera Vascongada* v. *S.S. Cristina*, 1938 A. C. 485, 493.

[2] *Seney* v. *Swift & Co.*, 260 U. S. 146, 149.

A substantial portion of petitioner's brief is devoted to its contentions relating to the question, which this Court is asked to pass upon, whether the subject matter of the counterclaims, although involving public funds, are commercial transactions within the "restrictive theory" of sovereign immunity and, if so, whether the decisions of some foreign nations accepting that restrictive theory denying sovereign immunity to activities connected with commercial enterprises and which was referred to by our State Department in a letter of May 19, 1952, should be followed by this Court.

Not only are petitioner's contentions in regard to this asserted question meritless, but also petitioner's position is contrary to the position it took in the Court of Appeals. Thus, petitioner is requesting this Court to pass upon a question which it deliberately removed from the Court of Appeals' consideration. In that court, petitioner conceded that the counterclaims dealt with public or governmental functions and that even within this restrictive theory respondent would be entitled to plead sovereign immunity to the causes of actions alleged in the counterclaims. This is more fully discussed in Point IV, page 35, *infra*. Petitioner should not be permitted to reverse its position in this Court and the asserted question presented by the petitioner relating to the restrictive theory of sovereign immunity should be disregarded.

In addition, the counterclaims pleaded by petitioner in the District Court explicitly demanded judgment "against the plaintiff, The Republic of China, for the sum of one million, six hundred thirty-four thousand, four hundred thirty-two and no dollars ($1,634,432.00) with interest and costs" (R. 26-27). Petitioner before the District Court argued it was entitled to affirmative judgment and it was these counterclaims demanding affirmative judgment

for $1,634,432.00 which the District Court passed upon (R. 36). In this Court, however, petitioner withdraws its demand for affirmative judgment.[3]

By this withdrawal, petitioner has rendered moot any question relating to the propriety of the order dismissing the counterclaims which demanded affirmative relief. Petitioner concedes that it is not entitled to affirmative relief against respondent (Petitioner's brief p. 11, f. n. 1). But, more important, it really doesn't matter whether the order dismissing the counterclaims demanding affirmative judgment against respondent for $1,634,432 is correct or incorrect, for petitioner, by withdrawing its demand, now has removed these particular counterclaims from the case.[4] We submit, therefore, that so far as the order dismissing these counterclaims is concerned, it is not involved in the question presented.

This would only leave for the Court's proper consideration the subsequent order which denied that part of petitioner's motion seeking leave to serve a further amended answer designating the counterclaims also as set-offs[5]

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[3] Petitioner states: "The City Bank does not seek an affirmative judgment against The Republic of China, but raises the counterclaims merely as a defense to the action" (Petitioner's brief, p. 11).

[4] Surely petitioner does not contend that its counterclaims even before the District Court were raised "merely as a defense to the action", as they are now asserting in this Court. If that were the case, the lower court's order "dismissing" them would be nothing more than an order striking the defenses. Such an order would clearly be a non-final one from which no appeal would lie (*Libbey-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. (2) 814), irrespective of any statement contained therein that entry of judgment is directed in accordance with Rule 54-b of the Federal Rules of Civil Procedure. See 6 Moore's *Federal Practice* (3rd Ed. 1953) pp. 286-287, fn. 10, 11, 12.

[5] Petitioner's motion to serve a further amended answer was combined with a motion for reargument wherein it attempted once more to sustain the counterclaims demanding affirmative relief. (R. 46-49).

(R. 57, 72). Actually, designation of the counterclaims also as "set-offs" was unnecessary under Rule 13 of the Federal Rules which denominates as "counterclaims" all claims brought by a defendant against a plaintiff. Moreover, merely to have designated the counterclaims also as set-offs would not have affected petitioner's demand for affirmative relief, because a set-off is not necessarily confined to the justice of a plaintiff's claim and an affirmative judgment may be had for any amount to which defendant establishes his right over and above the amount to which plaintiff proves he is entitled.[6] It seems clear, therefore, that even with respect to the second order the District Court's ruling concerned counterclaims, however designated, which counterclaims petitioner has now removed from the case.

Only if it be assumed, therefore, that petitioner's motion to the District Court can be construed as a request to serve a further amended answer pleading the context of the dismissed counterclaims as defenses in the nature of set-offs with no affirmative relief demanded, is there any proper question presented for review by this Court; provided it be further assumed that such an order was appealable, which, we submit, it was not.[7] Moreover, the factual assumption is unwarranted, for petitioner at no time requested the District Court to treat the counterclaims or set-offs except as demanding affirmative relief.

Even on the basis of these assumptions, however, the question presented, based on the facts and circumstances of the case, should be stated as follows:

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[6] *Penn. Rr. Co.* v. *Miller*, 124 F. (2) 160, cert. denied 316 U. S. 676.

[7] *Hancock Oil Co.* v. *Universal Products Co.*, 120 F. (2) 959, 960, cert. denied 314 U. S. 666.

Accepting petitioner's position in the Court of Appeals, that its proposed defenses in the nature of set-offs based on alleged Treasury notes of respondent relate to governmental functions and that the restrictive theory of sovereign immunity even if followed by the Court would not serve to deprive respondent of its sovereign immunity, was petitioner's motion, seeking leave to serve a further amended answer pleading said defenses in the nature of set-offs to respondent's suit predicated on Section 25-b of the Federal Reserve Act, properly denied.

Statement.

On December 3, 1948, when for reasons now a matter of history, it became important to transfer government funds out of the mainland of China, respondent, through its agency, The Shanghai-Nanking Railway Administration, requested petitioner's Shanghai office to accept a substantial deposit to be opened at petitioner's New York office in the name of respondent's agency (R. 13). Petitioner agreed to accept this deposit and on December 21, 1948 an account was established at petitioner's New York office in the amount of $200,000 in the name of respondent's agency, The Shanghai-Nanking Railway Administration (R. 13).

At the time petitioner was solicited to accept this deposit, the notes upon which petitioner bases its counterclaims were in existence and, according to petitioner, respondent was already in default on those obligations (R. 24-26).

Petitioner recognized that those obligations were to be treated as distinct and separate from the contemplated bank account, as is evidenced by petitioner's allegations that no debit of any kind has been made to the account except for a $7.50 service charge, and that the account is

now in credit of $199,992.50 (R. 13-14). Indeed, for petitioner to have lulled respondent into opening the account intending to use the funds in satisfaction of separate outstanding obligations already in default would hardly be consistent with the principles of fair-play espoused so vigorously in petitioner's brief.

After respondent's National Government became located in Taiwan (Formosa), respondent, being in urgent need of the funds to carry out governmental functions, made several demands upon petitioner for payment to it of the $200,000 bank deposit. One of these demands is contained in a letter dated August 25, 1949 (R. 27-28), made more than five years ago.

In accordance with petitioner's request contained in a letter of August 31, 1949 addressed to the Chinese Embassy at Washington, D. C. advising it that because of conflicting claims made on petitioner with respect to the account respondent "should take up the matter directly with the State Department in Washington and ascertain its views as to the establishment of the proper authority to deal with this account", respondent applied to the Secretary of State and on August 21, 1950 the Secretary of State, pursuant to Section 25(b) of the Federal Reserve Act (Title 12, U. S. C. Section 632), certified to petitioner that the deposit in question belongs to respondent (R. 8, 11).

Although the express provisions of Section 25(b) exonerate petitioner from all further liability once it honors the certification made by the Secretary of State, petitioner refused to comply with the certificate, but instead asserted that there are other adverse claims to the bank deposit in question, obviously made on behalf of the communist Chinese regime which is not recognized by the United States.

At no time prior to the service of its amended answer on July 11, 1952 did petitioner refuse payment of the account for any reason other than the alleged existence of adverse claimants. On October 18, 1950 and also on August 24, 1950 respondent, complying with the certificate from the Secretary of State, presented a check for payment to petitioner for the full amount of the deposit (R. 15) and on each occasion the check was returned with the notation that payment was refused because other persons claimed authority to collect the funds.

After the certificate from the State Department was obtained as petitioner requested in its letter of August 31, 1949 and petitioner continued in its refusal to pay the deposit to respondent, it became obvious that petitioner was determined not to pay the funds to respondent,[8] with the result that the only course open to respondent was to bring suit to enforce the certificate issued by the Secretary of State pursuant to Section 25-b of the Federal Reserve Act (Title 12 U. S. C. Section 632).

Accordingly, on May 2, 1951 suit was commenced in the United States District Court, Southern District of New York to recover the $200,000 deposit (R. 1, 4). This was more than three years ago, but respondent still is not in possession of these funds.

Before filing an answer and on the sole ground that adverse claims had been presented with respect to the account, petitioner succeeded in staying respondent's suit for one year in order to give notice, pursuant to New York Civil Practice Act §51-a, to the alleged adverse claimants

[8] In its amended answer petitioner specifically denies that respondent has authority to collect the bank deposit (R. 16) and in one of its affirmative defenses it pleads that the hostilities as a result of which respondent was driven from China was a civil war and that it is contrary to United States policy to favor the recognized government over the revolutionary government (R. 19-20).

in Peking and in Shanghai, China, advising them that, unless they brought suit on the deposit in question before the one-year stay expired, their causes of action would be time-barred in New York under that statute.

On March 14, 1952, before the one-year stay expired, petitioner served its answer, wherein no counterclaim or set-off of any kind was pleaded (R. 1).

After the one-year stay had been obtained and the notice had been served on the alleged adverse claimants representing the communist regime, a separate suit was started against petitioner in the Southern District of New York on behalf of the Chinese communist regime by the Nanking-Shanghai Railway Administration, K. F. Mok and Y. T. Yu (Civ. No. 77-1/1952). However, on December 3, 1952, petitioner entered into a stipulation permitting those alleged adverse claimants to discontinue the suit, the stipulation reciting that the parties were remitted to such rights, powers, privileges and immunities as each may have in respect to the other as though the suit had not been commenced.

On July 11, 1952, prior to the signing of that stipulation, petitioner served an amended answer herein setting forth two counterclaims and demanding judgment against "The Republic of China for the sum of one million, six hundred thirty four thousand, four hundred thirty two and no/100 dollars ($1,634,432.00) with interest and costs" (R. 26-27).

Both of the counterclaims arose out of transactions completely unrelated to the bank deposit for which respondent sues.

The first counterclaim was based on a Treasury note, payable at The Chase National Bank (R. 53) and purchased by J. P. Morgan & Co. (R. 24) allegedly on behalf of a syndicate in which petitioner claims a participating interest (R. 24).

Its second counterclaim was based on Treasury notes allegedly purchased by the Shanghai foreign branch of petitioner in 1947 and in 1948, payable at The Central Bank of China (R. 25).

Respondent's motion (R. 34) to dismiss the counterclaims which sought affirmative relief was granted with an opinion by Judge Irving R. Kaufman, of the Southern District of New York (R. 35, 41). Petitioner's subsequent motion for reargument and for leave to file an amended answer designating the counterclaims also as set-offs (R. 46), was denied also with an opinion by the District Court (R. 55, 57). On appeal taken by petitioners from both orders (R. 42, 58), the Court of Appeals for the Second Circuit, in an unanimous opinion written by Judge Frank and joined in by Judge Swan and Judge Medina (R. 64), affirmed both orders (R. 72). On April 26, 1954 this Court allowed certiorari, Mr. Justice Jackson taking no part in the consideration or decision of the application (R. 73).

Summary of Argument.

1. The writ should be dismissed as improvidently granted. None of petitioner's contentions are dispositive of the case because they presuppose that the counterclaims actually pleaded and dismissed did not seek affirmative judgment and were therefore valid in themselves as mere defenses in the way of set-offs. But the counterclaims dismissed did demand affirmative judgment for $1,634,432, with interest and costs (R. 26-27), and it was these counterclaims demanding affirmative judgment which the District Court passed upon in its first order dismissing the counterclaims (R. 36), and in its second order denying petitioner's leave to make an unnecessary amendment to the counterclaims which still demanded affirmative relief (R. 57). Petitioner, by withdrawing in this Court its demand for

affirmative judgment (Petitioner's brief p. 11), has rendered moot any question as to the correctness of the lower court's order precluding it from demanding affirmative relief, something which it no longer seeks. Moreover, if the orders be treated as involving mere defenses and not counterclaims, they were not appealable.

2. But if this Court is disposed to review petitioner's contentions, we submit the proposed defenses in the nature of set-offs are clearly not maintainable against respondent, a friendly foreign sovereign, which is not subject to suit, directly or indirectly, without its consent. The cases, including pronouncements by this Court, which state this doctrine are legion.

3. The decisions relied on by petitioner, holding that where the United States brings a suit the defendant may set-off any claim it has, are clearly distinguishable, since they are based upon the specific consent of the United States contained in a statute that such set-offs may be pleaded against it.

4. Congress, fully familiar with the principles of sovereign immunity, vested the federal courts with exclusive jurisdiction of claims by a foreign sovereign against a national bank involving bank deposits certified by the Secretary of State as belonging to the sovereign, but Congress went no further. If Congress had desired, it could have effectively provided, just as it had done in legislating on suits brought by the United States, that in such a proceeding by a foreign sovereign all credits could be taken by the bank, or merely certain types of credits arising from jure gestionis (thereby adopting the restrictive theory). Congress could amend Section 25-b of the Federal Reserve Act so that, in exchange for the Secretary of State's certificate and the other benefits, a sovereign which avails itself

of the Act would be deprived of so much of its immunity as Congress desired. But it is for Congress to make this change, not for the courts.

5. "The Draft Convention of Courts in Regard to Foreign States", resulting from the research conducted by Harvard University in 1932, (hereinafter referred to as the "Harvard Draft Convention"), which goes far beyond established precedents in suggesting limitations on the general doctrine of sovereign immunity, is yet careful to preserve to sovereigns full immunity with respect to counterclaims or set-offs arising out of transactions extrinsic to those upon which a sovereign plaintiff's claim is based.

6. Where a sovereign institutes an action it subjects itself to the procedure and rules of decision governing the forum it has sought only so far as they are applicable to the particular cause of action which is the subject matter of the suit. That is to say, once the consent to litigate a particular claim is obtained, then the rules of the forum governing the procedure to enforce that claim apply. But the rules of procedure cannot be relied upon to furnish in the first instance a sovereign's consent to litigate a claim or to make an otherwise unenforceable claim enforceable.

7. This does not result in rendering a defendant who has been sued by a sovereign "defenseless", as is suggested by petitioner, for no rule of immunity has ever been extended to deprive a defendant of a legal defense to the cause of action sued upon.

8. A claim in the nature of recoupment has always been permitted against a sovereign regardless of consent, because recoupment goes to the justice of plaintiff's claim and is a true defense permitting a defendant to reduce a plaintiff's recovery by showing facts arising out of the same trans-

action sued upon which establish that plaintiff's damages were really not as high as alleged.

9. On the other hand a set-off, as this Court itself has declared, has never been extended to suits between governments and individuals, in the absence of express consent of the sovereign. This is for the reason that a set-off does not relate to the justice of the particular claim in suit; it permits a defendant to raise claims arising out of transactions independent of those sued upon, and it is therefore not a true defense to the claim in suit. In short, the indirect or permissive counterclaim, which includes set-offs, must be tested as if it were an independent suit, and unless the sovereign has consented to be sued thereon, it is not maintainable.

10. The questions raised by petitioner's contentions based on the restrictive theory of sovereign immunity should be disregarded by the Court because of the contrary position taken by petitioner in the Court of Appeals.

11. In any event, the doctrine is squarely opposed to previous decisions of this Court where the same argument that immunity should be limited to governmental functions as distinguished from commercial activities was advanced and rejected.

12. There are numerous countries who have refused to follow the restrictive theory of immunity.[9] As Mr. Tate's letter indicates, there are at least sixteen countries, includ-

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[9] The bulk of decisions by civil law countries, some of which are cited in petitioner's brief, together with the many contrary decisions, will be found collected and discussed in the Department of State's treatise, prepared by Mr. Conrad E. Snow, Chairman, submitted to the members of the Legal Adviser's Committee on Sovereign Immunity, dated August 25, 1949, and entitled "The Law of Sovereign Immunity".

ing the United States and the British Commonwealth, who have not applied the restrictive theory of immunity, as opposed to possibly eleven civil law countries that have followed it. Decisions of civil law countries adopting the theory of restrictive immunity have existed for many decades and have been brought to the attention of this Court, which has refused to follow them.

13. The general doctrine of sovereign immunity is so embedded in our law that it cannot be uprooted by judicial decision or by the State Department's shift of policy, but any change in the substantive law should be effected by Congress or by treaty. Indeed, the State Department recognizes that "its shift in policy" cannot control the courts. In the past, where it has sought to exclude commercial activities from sovereign, it has done so by treaty (Petitioner's brief pp. 44-46.) Significantly, no such treaty has been executed with respondent.

14. This Court long ago declared that international comity requires that foreign governments be notified of any modification of immunity "in a manner not to be misunderstood" before the modification be effected. Obviously to overrule previous decisions, thereby giving a retroactive effect to the modification, will not comply with this rule.

15. Even accepting the so-called trend or shift in policy expressed in Mr. Tate's letter, the sovereign still remains immune to claims arising from public or governmental transactions as distinguished from commercial activities. The counterclaims here involved, dealing with the Government's Treasury Notes, fall within that category, for what could be considered more "governmental" in nature than the fiscal operations of a sovereign and the bonds or other obligations it issues to raise revenue upon which its very existence depends.

16. The courts consistently have held that debts due from a foreign nation cannot be enforced in the courts of the creditor nation, and that principle is explicitly adopted by the Harvard Draft Convention. Although the Harvard Draft Convention adopts the restrictive theory of immunity, it specifically provides that a sovereign cannot be compelled to litigate matters relating to its public debt, which it defines to include Treasury notes, such as are involved in the counterclaims herein.

POINT I.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

If we are correct in our position that the only relief sought by petitioner and denied him by the District Court concerned counterclaims—whether designated set-offs or otherwise—demanding affirmative judgment against respondent (ante pp. 2-7), then there is nothing for this Court to review, since petitioner, by here withdrawing its claim for affirmative judgment, renders moot any question relating to the propriety of the orders of the District Court.

This seems indisputable with respect to the first order of the District Court, which unquestionably dismissed counterclaims demanding affirmative relief (R. 26-27, 36). This seems equally clear with respect to the second order, which denied petitioner leave to amend the dismissed counterclaims so as to designate them also as set-offs, because the requested leave would not have affected petitioner's demand for affirmative judgment[10] and indeed peti-

[10] Under a "set-off" an affirmative judgment may be had for any amount defendant establishes his right over and above the amount to which plaintiff proves he is entitled. *Penn. Rr. Co.* v. *Miller*, 124 F. (2) 160, cited *supra*, f. n. 6.

tioner in the District Court persisted in its demand for affirmative judgment. Petitioner cannot complain that it was improperly denied leave to plead the counterclaims as defenses in the nature of set-offs without affirmative relief, when it never made any such application.

But even if it be assumed that petitioner's motion for leave to serve an amended answer to designate the dismissed counterclaims also as set-offs was broad enough to have included a request to plead the context of the counterclaims as defenses in the nature of set-offs without seeking affirmative relief, and further that the order denying such relief was ~~applicable~~ appealable[11], the writ should nevertheless be dismissed because in those circumstances none of the contentions made by petitioner are decisive of the case (*McCarthy et al.* v. *Brunner*, 323 U. S. 673).

Assuming arguendo that petitioner did request such relief, that the order was appealable, and that the proposed defenses in the nature of set-offs are legally sustainable, yet the granting or denial of the motion to serve a third[12] answer was in the discretion of the lower court and the exercise of that discretion should not be reviewed here.

Moreover, the denial of the motion by the court because of untimeliness was legally sound. Petitioner's motion sought specifically to amend the counterclaims which already had been dismissed and this could not be granted until the judgment of dismissal was first reopened. As the lower court stated (R. 56-57), relief of that nature is to be applied for within ten days after the entry of the judgment (Rule 59 of the Federal Rules; *Markert* v. *Swift & Co.*, 173

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[11] As to appealability, see p. 5, *supra*, f. n. 7.

[12] Petitioner's original answer which contained no counterclaims or set-offs of any kind was served on March 14, 1952 (R. 1); by stipulation and order it served an amended answer on July 11, 1952 (R. 2); its application to serve a further amended answer, if granted, would have been the third answer.

F. (2) 517, 519), whereas petitioner's motion was made thirteen days after judgment was filed.

In addition, the Court should not prematurely pass upon the validity of defenses before the cause of action sued upon is determined, for unless respondent sustains its claim, the issues raised by the defenses will not be reached.

POINT II.

A COUNTERCLAIM ARISING FROM TRANSACTIONS EXTRINSIC TO THAT OUT OF WHICH THE PRIMARY CLAIM AROSE IS THE EQUIVALENT OF AN INDEPENDENT SUIT AGAINST THE SOVEREIGN WHICH MAY NOT BE SUED WITHOUT ITS CONSENT.

The Doctrine of Sovereign Immunity.

There can be no question that the basic doctrine of sovereign immunity is an integral part of Anglo-American law.[13] Indeed, it is an unquestioned part of the law of most civilized nations.[14] Historically, the doctrine appears to be founded on the implied agreement of the local sovereign to yield local jurisdiction as a matter of international comity and as an indispensable factor to the conduct of friendly intercourse between nations[15], as well as upon the principle that as a consequence of state equality, no state

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[13] *The Schooner Exchange* v. *McFadden*, 7 Cranch 116; *The Parlement Belge*, (1880) L. R. 5 P. D. 197; 1 Hyde on International Law 813; 1 Oppenheim's International Law 239-241.

[14] This is nowise disputed by Mr. Tate's letter of May 19, 1952 wherein the existence of the basic doctrine is conceded. At p. 1 of the State Department's treatise on "The Law of Sovereign Immunity" (referred to *supra*, f. n. 9) the following is said: "Formulated in earlier times by classical writers, the principle has been endowed since the beginning of the 19th Century with the certainty and definiteness of concordant and authoritative decisions of municipal courts in the majority of the states of the world."

[15] *The Schooner Exchange* v. *McFadden*, 7 Cranch 116, *supra*, f. n. 13.

can exercise jurisdiction over another[16]. The latter principle is explicitly affirmed by Article 2(2) of the United Nations, which declares that the United Nations Organization is based upon "the sovereign equality of its members".

Irrespective of the genesis of the doctrine, we submit it is a far from hoary one. It has a fundamental and sound basis which is just as important today as it ever was, viz., that a sovereign which represents all of its people must itself decide when it will consent to litigate a claim by one seeking to satisfy only his own selfish interests without regard to the interests of all of the people and without regard to the continued existence of the very sovereign involved.[17] Concededly, litigation in some instances will not drastically affect the people or the continued existence of the sovereign. But this is something which the sovereign alone can determine, and in the absence of its consent to be sued, its plea of immunity should be respected, with the claimant being relegated to pursuing relief through diplomatic channels where the primary interests of the people and of the sovereign can be balanced against the merit of the claim. The doctrine is so entrenched in the decisions and in international law that one dealing with a foreign sovereign, which has not by treaty, declaration or otherwise consented to be sued on the transaction involved, must be deemed to have accepted as an integral part of his dealings the condition that, in the event a claim in favor of the individual arises, it cannot be litigated but must be resolved

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[16] *The Roserie*, 254 Fed. 154, 161.

[17] *U. S.* v. *Lee*, 106 U. S. 196, 206, where the court points out that to permit a sovereign to be sued would constitute a serious interference with the performance of the sovereign's functions and with its control over its instrumentalities, funds and properties; *Ex Parte State of New York, No. 2*, 256 U. S. 503, 511, where the Court observed to permit a creditor to collect his debt would be to permit him in some degree to destroy the government itself.

through diplomatic channels.[18] While the risk of default under such a condition may perhaps be greater than where two individuals are involved, yet there is no compulsion in the dealings between the individual and the sovereign, but the individual must be considered voluntarily to have accepted the risk as counterbalanced by the advantages he expects to derive from the transaction.[19]

At all events, it seems clear that the doctrine is now an accepted and well-recognized rule in the United States[20] and in most other countries[21]. Although some have stated that the doctrine should be limited, there has never been any serious suggestion that the doctrine should or can be discarded. Accordingly, we pass over quickly petitioner's contention that the doctrine should be abrogated in its entirety, and we turn to the question of whether a plea of immunity precludes a defendant, against whom the sovereign has instituted suit, from asserting a counterclaim or set-off which is unrelated to the subject matter of the main suit.

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[18] *Ex Parte Peru*, 318 U. S. 578 at p. 589: "* * * our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by compulsions of judicial proceedings."; *Wulfsohn* v. *Russian Republic*, 234 N. Y. 372, 375-376.

[19] See, for example, the 20% annual interest rate on the Treasury Notes referred to in petitioner's second counterclaim (R. 33).

[20] So far as the doctrine applies to suits against the States of the Union by other citizens of the United States or of foreign states, it is ingrained in the Federal Constitution itself. See U. S. Constit. Amend. XI.

[21] The doctrine is followed with no limitations by the Chinese Courts. See *Freres* v. *The Soviet Mercantile Fleet*, Jr. Du. Dr. Int. 1928, 1104, discussed on the last page of the State Department's treatise "The Law of Sovereign Immunity" (*supra*, f. n. 9).

A friendly foreign sovereign is not subject to suit, directly or indirectly, without its consent.

In *Commonwealth* v. *Matlack*, 4 Dall. 303, this Court declared:

> "* * * that the defendant could not indirectly recover from the state a substantive independent claim by way of set-off, any more than he could directly recover a debt due from the state, by bringing a suit against her."

And in *Watkins* v. *U. S.*, 9 Wall. 759, it was said (at p. 764):

> "The right of set-off did not exist at common law, but is founded on the statute of 2 George II, c. 24, s. 4, which in substance and effect provided that where there were mutual debts between the plaintiff and the defendant, one debt may be set against the other, and such matter may be given in evidence under the general issue. Set-offs might even after the passage of that act, be made, in a proper case, between plaintiff and defendant, but it never extended to suits between government and individuals, * * *"

And again in *Nassau Smelting & Refining Works* v. *U. S.*, 266 U. S. 101 (at p. 106):

> "The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist, unless there is specific congressional authority for it."

This principle was reaffirmed in *U. S.* v. *Shaw*, 309 U. S. 495, 502 where this Court reviewed the cases on the subject and commented that only when authorized by specific

Congressional statute can a set off or counterclaim or an original suit be brought against the United States.

In *Berryessa Cattle Co.* v. *Sunset Pacific Oil Co.*, 87 F(2) 972 (a decision cited by this Court in *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47 at p. 50 f. n. 3), the Court of Appeals agreed with appellee's contention "that there is no right to set-off in this case because the exercise of such a right is inconsistent with the right of a sovereign state not to be sued without its consent" (87 F(2) at p. 974). The Court of Appeals quoted with approval the following language from *People* v. *Mills*, 56 Cal. 401: "It would seem to be hardly necessary to cite authorities to the proposition, that a State cannot be sued in her own State, directly or indirectly, as by setting up a counterclaim or set-off; nor can any judgment be recovered against the State, except when the same is permitted by express statute."[22]

Professor Moore, in 3 Moore's Federal Practice (3rd Ed. 1953) Par. 13, 15 [2], at pages 42-43, speaking of the effect of sovereign immunity on the jurisdiction of a federal court to entertain a counterclaim against a sovereign plaintiff, says:

> "But the power to entertain a claim against a sovereign is circumscribed by the general principles of immunity * * * The mere institution of suit does not constitute a waiver of immunity by the plaintiff sovereign. Such plaintiff is, however, subject to a

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[22] See also *South African Republic* v. *La Compagnie Franco-Belge*, (1898) 1 Ch. 190; *Kingdom of Roumania* v. *Guaranty Trust Company*, 250 Fed. 341, 343-344, cert. denied 246 U. S. 663 (cited in *Monaco* v. *Mississippi*, 292 U. S. 313, 323 f. n. 2); *In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 190, cert. denied 264 U. S. 698; *Re Monongahela Rye Liquors*, 141 F(2) 864; *U. S.* v. *Hosteen Tse-Kesi*, 191 F(2) 518, 521; *Republic of China* v. *American Express Co.*, 195 F(2) 230, 233; *In re Greenstreet, Inc.*, 209 F(2) 660, 663; *U. S.* v. *Wessel, Duval & Co.*, 115 F. Supp. 678, 686-687; *U. S.* v. *Lacy*, 116 F. Supp. 15, 21.

> counterclaim setting forth matter of recoupment for the purpose of defeating or diminishing the plaintiff's recovery but not for the purpose of an affirmative judgment against the sovereign unless there is some authorization therefor in addition to the institution of the action. Unless the law of the sovereign plaintiff, or some other law paramount to its own, such as the Bankruptcy Act, permits a set-off against its claim and this set-off to be asserted in the federal court where the action is pending, then there would be no right of set-off. An affirmative judgment cannot be obtained against the plaintiff sovereign on either a compulsory or permissive counterclaim absent its consent to be sued on the type of claim involved and in the federal court where the counterclaim is asserted."

Thus, while under Rule 13 of the Federal Rules the distinction between recoupment and set-off is unimportant so far as designation is concerned, yet the distinction remains important so far as determining whether the claim may be pleaded against a sovereign.

Recoupment as Opposed to Set-Off.

A claim in the nature of recoupment has always been permitted against a sovereign regardless of consent[23], because recoupment goes to the justice of the plaintiff's claim and is a true defense, permitting the defendant to reduce plaintiff's recovery by showing facts arising out of the transaction sued upon which establish that plaintiff's damages were really not as high as alleged.

That recoupment is a true defense is demonstrated by the decisions holding that it is allowable against a sov-

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[23] *U. S.* v. *U. S. F. & G. Co.*, 309 U. S. 506; *U. S.* v. *Wessel, Duval & Co.*, 115 F. Supp. 678, 686-687.

ereign even though the statute of limitations has expired on the claim recouped. Contrary to petitioner's assertion, this Court in *Bull* v. *U. S.*, 295 U. S. 247, authoritatively determined that, where there is no specific consent by the sovereign to a counterclaim, it may be pleaded only by way of recoupment. There was no statute or other independent consent of the sovereign which could have been relied upon, for the claim raised by defendant had been outlawed by the statute of limitations and therefore the act of Congress[24] which permitted a credit to be pleaded by a defendant was inapplicable. Nonetheless, the claim was allowed because it was in the nature of recoupment and was pleadable against a sovereign plaintiff without regard to consent.[25]

Petitioner's attempt to minimize the *Bull* case by citing *U. S.* v. *Ringgold*, 8 Pet. 150, for the asserted proposition that there is no limit to the type of claim that can be asserted as a defense to a suit by the United States, ignores that in the *Ringgold* case decided in 1884 the defendant had the benefit of the specific statutory consent of the Government[26] which permits set-offs of any kind whether or not related to the main suit.

Indeed, petitioner's reliance upon those decisions which have permitted set-offs against the United States pursuant to that statute, serves only to defeat its argument that a sovereign merely by becoming a plaintiff surrenders its immunity to suit. The United States in its sovereign capacity by specific legislation has consented to set-offs of any nature, and only because of its explicit consent are they

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[24] Act of March 3, 1797, Sess. II Chap. XX, now found in 28 U. S. C. §2406.

[25] Cf. *Rothensies* v. *Electric Battery Co.*, 329 U. S. 296, 299, where the outlawed claim pleaded against the Government was unrelated to the main suit and, therefore, disallowed.

[26] Act of March 3, 1797, Sess. II Chap. XX, cited *supra*, f. n. 24.

pleadable.[27] Where the terms of the statute are not complied with (*Hall* v. *U. S.*, 91 U. S. 559), or where there is no statute which approves the set-off (*U. S.* v. *Buchanan*, 8 How. 83), the United States' defense of sovereign immunity has been upheld. The decisions cited by petitioner are, therefore, clearly inapplicable, since the set-offs therein permitted against the United States were pursuant to statutory authority of the sovereign, which is wholly lacking here.

Petitioner does not urge that if the United States brought suit in a foreign court it would be subject to set-offs in that forum, for the statutory consent which applies to courts of the United States would not be applicable to foreign courts. Similarly, respondent has not consented by declaration or otherwise that set-offs on independent claims be allowed against it in courts outside of its territory.

In addition, Congress, fully familiar with the principles of sovereign immunity, vested the federal courts with exclusive jurisdiction of claims by a foreign sovereign against a national bank involving bank deposits certified by the Secretary of State as belonging to the sovereign, but Congress went no further. Congress, having provided foreign sovereigns with special benefits in bank deposit cases, could have, and by amendment of the Act may still, limit it in any way it desires. But it is for Congress to do so, not for the courts.

A Set-Off Is the Equivalent of an Independent Proceeding Requiring the Sovereign's Separate Consent Thereto.

Whereas recoupment goes to the justice of a plaintiff's claim, a set-off does not go to the justice of that particular

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[27] For discussion of counterclaims and offsets involving the United States, see 3 Moore's Federal Practice (3 Ed. 1953), pp. 66-82.

claim because it arises from acts or transactions independent and separate from the claim sued upon.[28] In short, a counterclaim or set-off arising out of a transaction extrinsic to that out of which the primary claim arose, is the *equivalent of an independent suit against the sovereign,* which may not be sued without its consent. This was made clear in *Re Monongahela Rye Liquors,* 141 F. (2) 864 where the court explained the significance in suits by sovereigns of Rule 13-b of the Federal Rules of Civil Procedure allowing permissive counterclaims. We quote from the court's opinion (p. 869):

> "A distinguishing feature of set-off is that it arises out of a transaction extrinsic to that out of which the primary claim arose. Cv. Hastorf *v.* Degnon-McLean Contracting Co., D. C. N. Y., 128 F. 982, 983. In short, a set-off rests upon a claim or demand based upon an independent cause of action. The independent nature of set-off is plainly recognized by the Federal Rules of Procedure. Thus, Rule 13(b) allows for the assertion of set-offs as 'Permissive Counterclaims'. But, unlike in the instance of a true counterclaim, i.e., a claim or demand arising out of the same transaction which gave rise to the primary claim and which must be asserted timely as a counterclaim (Rule 13(a)), failure to plead a set-off as a counterclaim does not defeat the right of action upon which it is based. The present importance of the distinction between a counterclaim and a set-off lies in the fact that, under both federal and local law, in a suit by a sovereign a plea of set-off, being based as it is upon matter unrelated to the primary claim, is the equivalent of an independent suit against the sovereign which, of course, may not be sued without its consent. See Nassau Smelting & Refining Works, Ltd. *v.* United States, 266 U. S. 101,

[28] *Penn Rr. Co. v. Miller,* 124 F. (2) 160, cert. denied 316 U. S. 676.

106, 45 S. Ct. 25, 69 L. Ed. 190; Commonwealth *v.* Matlack, 4 Dall, Pa. 303, 1 L. Ed. 843."

The above principles are in complete accord with The Harvard Draft Convention.[29] Article 5 of that Draft Convention provides: "A complainant State, by instituting a proceeding in a court of another State, submits to the jurisdiction of that court in respect of a direct counterclaim." Article 6 provides: "A complainant State, by instituting a proceeding in a court of another State, submits to the jurisdiction of that court in respect of an indirect counterclaim only if that counterclaim is one for which the respondent could maintain an independent proceeding in that court against the complainant State."

The pertinent words used in these Articles are defined in Article 1. "Counterclaim" is defined as "a claim by a respondent against a complainant" (Article 1(e)). A "direct counterclaim" is defined as "a counterclaim arising out of the facts or transactions upon which a complainant's claim is based" (Article 1(f)). An "indirect counterclaim" is defined as "a counterclaim arising out of the facts or transactions extrinsic to those upon which a complainant's claim is based" (Article 1(g)).

In the comment to Article 1(e), (f) and (g) it is recognized that various meanings have been ascribed to the terms "counterclaim", "set-off" and "recoupment", and it is there stated (Am. J. of Intern. Law Supp. (1932) at p. 492):

> "For the purpose of this Convention, the factual distinction represented by the terms 'recoupment' and 'set-off', seems to be one which it is useful to preserve. It is not a question of abandoning a fixed terminology, since none exists. A new term of art

[29] For complete text of this Draft Convention see American Journal of International Law, 1932, Vol. 26 Supplement pp. 451-736.

may therefore be created. For this purpose, it would be possible to speak of 'Counterclaims, Class A,' and 'Counterclaims, Class B.' Less awkward and more descriptive terms have been used in the text, namely, 'direct counterclaims' and 'indirect counterclaims.' "

Speaking of indirect counterclaims, the comment continues (Am. J. of Intern. Law Supp. (1932), at pp. 517-518):

"Thus the Article does not afford a new basis for jurisdiction over a State; it merely permits the consolidation of actions if the law of the forum so provides. It is obvious that the stipulation of submission to the jurisdiction herein set forth would not require a court to admit the indirect counterclaim if under the law of the forum such a counterclaim would not be admitted against a private complainant. This article merely has the effect of raising the bar of state immunity when, according to the applicable procedure, it is pertinent to examine into that immunity.

"Thus if State X institutes in a court of State Y a proceeding against A to recover damages for breach of a contract to sell locomotives, State X thereby submits to the jurisdiction of the court in respect of a counterclaim by A arising out of a lease of immovable property (Article 9). If under the law of the forum such an indirect counterclaim is not admissible, A's counterclaim will be rejected by the court on that ground but not on the ground of the immunity of State X.

"In the second place, this article assures a complainant State that by instituting a proceeding in a court of another State, it will not be forced to respond to an indirect counterclaim for which an independent action could not be maintained by the respondent against the complainant State. For example, if State X institutes a proceeding against

> A in a court of State Y, for breach of a contract to sell wheat, A would not be able in the same proceeding to adjudicate a claim which he might have against State X for injuries received from the negligent operation of a mail truck operated by an agent of State X. Under the procedural rules of some forums, such actions might be joined in order to avoid multiplicity of actions or for other reasons; but the text of this article is intended to prevent the possibility of State X being sued, merely because it became a complainant, in an action which otherwise could not be maintained against it by the respondent and which action, moreover, is based on claims arising out of matters extrinsic to those on which the original claim of the complainant State is based, and, therefore, not in the nature of a defense to the complainant's action."

It becomes apparent, therefore, that two prerequisites must exist before an indirect counterclaim (or what under the Federal Rules is termed a permissive counterclaim), may be pleaded against a foreign state. The first prerequisite is purely a matter of local procedure; unless the procedural law permits indirect counterclaims to be pleaded against private ligitants in general, then the counterclaim claimed is not entertainable, not because a sovereign is involved, but because the procedural laws prohibit its being pleaded. On the other hand, if the procedural laws permit indirect counterclaims, the second prerequisite, which deals with matters of substantive law, must be complied with. Jurisdiction exists over the counterclaim treating it as an independent proceeding, but if the sovereign's separate consent thereto is lacking, the counterclaim must be dismissed.

The Principle Requiring a Sovereign Plaintiff to Conform to Procedural Rules of the Forum Cannot Be Relied Upon to Furnish Consent to Litigate a Claim or to Make an Unenforceable Claim Enforceable.

A sovereign by becoming a litigant subjects itself to the rules of procedure of the forum only so far as they are applicable to the particular cause of action which is the subject matter of the litigation, and even that is a limited principle. Thus, it would have to post security, pay costs, submit to discovery and to an oral examination.[30] But even petitioner does not contend that a sovereign by becoming a litigant subjects itself to the rules of procedure with respect to judgments and execution thereon even with regard to the subject matter of the suit to which it has consented. Nor, it is submitted, are the ordinary rules of procedure dealing with counterclaims unrelated to the main suit applicable to a sovereign plaintiff who has not consented to suit on that independent claim. Certainly a sovereign who becomes a litigant by appearing voluntarily as a defendant in a suit against it on a particular claim is not subject to further unrelated claims merely because the rules of procedure ordinarily permit a plaintiff to amend his complaint to include new causes of action.

Where a sovereign becomes a litigant, whether as plaintiff or defendant, the procedural rules determine merely if the subsequent inclusion in the litigation of new causes of action are permissible, provided the sovereign also consents to suit thereon. The consent of the sovereign is required before an enforceable claim comes into being. But even the sovereign's consent to have the new cause of action also

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[30] *Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, and cases cited therein. In the *Guaranty* case, the procedural rule of limitation of time to sue was applied to the particular cause of action sued upon.

litigated in that suit (whether it is a defendant and the complaint is sought to be amended to include an independent cause of action, or if it is a plaintiff and defendant wishes to counterclaim on unrelated causes of action) would not make the claim one which could be litigated in the particular suit unless, in addition to the sovereign's consent, the procedural rules of the forum permit the new claim to be litigated in the original suit. Conversely, the procedural rules permitting litigation on claims unrelated to the original suit do not make the claim an enforceable one unless the sovereign gives its consent to that particular claim.

It matters not, therefore, that Rule 13(b) of the Federal Rules provides that "permissive counterclaims" arising from transactions unrelated to the main suit may be pleaded by a defendant. The rules of procedure merely permit the joining of separate and independent claims in one proceeding to avoid a multiplicity of suits, provided, of course, that the court has jurisdiction over the unrelated claim and that the unrelated claim as a matter of substantive law is an enforceable one. Rule 82 of the Federal Rules explicitly states that nothing therein contained shall be construed to enlarge or diminish the jurisdiction of the court. The doctrine that a court will not exercise jurisdiction over a foreign sovereign existed long before the Federal Rules were promulgated, and by virtue of Rule 82 nothing in the Rules may be relied upon to affect the exercise of the Court's jurisdiction.

In *U. S.* v. *Sherwood*, 312 U. S. 584, this Court ruled that where the sovereign had not independently consented to a particular suit, the consent could not be supplied by the Federal Rules.[31] After stating the general rule that the United States as sovereign is immune from suit save

[31] See also *Urate* v. *U. S.*, 7 F. R. D. 705.

as it consents to be sued (at p. 586), the Court stated (at pp. 589-590):

> "But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

And at page 591:

> "The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction."[32]

In sum, if the indirect or permissive counterclaim is not one upon which an independent proceeding could have

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[32] The result in *U. S.* v. *Yellow Cab Co.*, 340 U. S. 543, is perfectly consistent with the *Sherwood* case. In the *Yellow Cab* case the Court first determined that the statute involved gave independent consent by the sovereign to be sued for contribution. The consent having been found in that statute, the question of whether it could be joined in the suit was purely one of procedure. Moreover, the statute granting the consent explicitly provided that the Federal Rules were to control.

been brought against the Sovereign, then it may not be pleaded as a matter of substantive law.[33] In this respect, whether the policy of immunity is based on comity or on the inherent lack of jurisdiction of the Court,[34] it is clear that it is "an over-riding principle of substantive law."[35]

It is significant that petitioner has not cited one authoritative decision which has permitted a permissive counterclaim or set-off against a sovereign without its consent thereto or which has even implied that such a counterclaim could be asserted. *State of Russia* v. *Bankers Trust Company*, 4 F. Supp. 417, cited by petitioner at pp. 13-14 of its brief, was affirmed sub nom. *United States* v. *National City Bank of New York*, 83 F.(2) 236, cert. denied 299 U. S. 563, in which the Court of Appeals rejected the lower court's reasoning and affirmed solely on the ground the set-off was related to the main suit. *The Gloria, The Thekea, etc.* v. *Federal Sugar Refining Co.*, 286 Fed. 188, cited by petitioner on page 30 of its brief, resulted in questions being certified by the Court of Appeals for the Second Circuit in 295 Fed. 1020, and in the questions being answered by this Court in 266 U. S. 328. This is the same *Thekea* case which petitioner discusses on page 16 of its brief for the proposition that, when a sovereign sues in our courts to enforce a claim in admiralty, "it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter.*" 266 U. S. 328, 339-340. The quotation in petitioner's brief (p. 30) from *People* v. *Brandreth*, 36 N. Y. 191, is from the dissenting opinion.

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[33] The position is also adopted by the Harvard Draft Convention. See Article 14 and comments thereon, Am. J. of Intern. Law Supp. (1932) at p. 646.

[34] *Yokohama Specie Bank* v. *Chengting T. Wang*, 113 F. (2) 329, 331, cert. denied 311 U. S. 690; *Wulfsohn* v. *Russian Republic*, 234 N. Y. 372, 376.

[35] *Ex Parte Peru*, 318 U. S. 578 at p. 588.

POINT III.

THE COUNTERCLAIMS ASSERTED DO NOT ARISE OUT OF THE SAME TRANSACTION OR SUBJECT MATTER OF THE SUIT.

There is no merit to petitioner's argument that its counterclaims are actually compulsory counterclaims within Rule 13(a) of the Federal Rules and are tantamount to pleas of recoupment assertible as a defense to the sovereign's suit even without its consent. We fail to see any logical relationship between a Treasury note issued in 1920 to secure a loan to the Pacific Development Company for the economic rehabilitation of China and Short Term Treasury notes or bonds purchased by petitioner in China in 1947 and 1948 on the one hand, and on the other hand the bank deposit which was opened in the name of respondent's agency The Shanghai-Nanking Railway Administration. Petitioner itself treated the bank deposit and the Treasury notes as separate obligations, as evidenced by its allegations that no debit of any kind has been made to the account except for a $7.50 service charge, and that the account is now in credit of $199,992.50 (R. 13-14).

A holding that these are compulsory counterclaims means that, unless pleaded, petitioner would have been foreclosed from ever suing thereon. But surely in a suit by a private party to recover a bank deposit, *res adjudicata* would not prevent a bank from asserting in a later independent suit a claim on unpaid notes. Since the facts on which petitioner relies for relief can nowhere be found in respondent's complaint and are quite distinct from the facts there set forth, the counterclaims can not be considered as compulsory counterclaims or mere pleas of recoupment.

Nor is there any substance to the contention, "as one of the grounds for sustaining the counterclaims, that they were payable at the City Bank, and that, therefore, under decided cases and pursuant to §147 of the Negotiable Instruments Law of the State of New York[36], they should be considered as a direction to pay the obligee to the extent of the bank account sought to be recovered in the action." (Petitioner's brief, p. 31). That Section is clearly inapplicable, inasmuch as each of the obligations alleged in petitioner's counterclaims are *not* payable in New York at petitioner's bank where the deposit is located, as petitioner admits. The Treasury note alleged in the first counterclaim is payable at The Chase National Bank (R. 53), of no affiliation whatsoever with petitioner. Similarly, with respect to each of the Treasury notes alleged in the second counterclaim, petitioner admits that they were not purchased by or payable at its bank in New York where the funds respondent is suing for are deposited, but that each was purchased by its Shanghai branch (R. 25) and is payable at The Central Bank of China or its agents, one of which petitioner asserts was its Shanghai branch[37] (R. 33, 53).

Plainly, under the Section relied upon, a New York bank which holds a deposit cannot use the deposit funds to satisfy a Treasury note not payable in New York or payable at some other bank.

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[36] Section 147 of the New York Negotiable Instruments Law provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

[37] It passes understanding how petitioner can properly contend that the provisions of the New York Negotiable Instruments Law are applicable to government Treasury notes executed in China and made payable in China.

POINT IV.

THE PLEA OF SOVEREIGN IMMUNITY TO THE COUNTERCLAIMS IS NOT IN CONFLICT WITH THE SUGGESTED CHANGE IN POLICY OF THE STATE DEPARTMENT TO RESTRICT THE DOCTRINE OF SOVEREIGN IMMUNITY TO ACTIVITIES CONNECTED WITH PUBLIC OR GOVERNMENTAL ACTS. FURTHERMORE, A SHIFT IN POLICY BY THE EXECUTIVE DEPARTMENT CANNOT CONTROL THE COURTS.

Petitioner's assertion that this Court should follow the restrictive theory of sovereign immunity in this case should be disregarded by the Court because of the contrary position taken by petitioner in the Court of Appeals. In its brief to the Court of Appeals petitioner admitted that the obligations alleged in both counterclaims represented loans for the "economic" rehabilitation of China, and it conceded in its oral argument that, even within the restricted views of the State Department as expressed in Mr. Tate's letter, respondent would be entitled to plead sovereign immunity to the causes of actions alleged in the counterclaims. This appears from the opinion of the Court of Appeals itself, where it said (R. 68):

> "Defendant, as we understand it, does not argue that this new trend, if adopted by our courts, would here serve to deprive plaintiff of its sovereign immunity."

Petitioner should not be permitted to shift its position in this Court by now urging that the restrictive theory, if adopted by our courts, would here serve to deprive respondent of its sovereign immunity.

But assuming the question is properly before the Court, we submit that the prior decisions of this Court, wherein the restrictive theory was considered and rejected, are bind-

ing precedents which should be followed. The decisions of some civil law countries contained in petitioner's brief are hardly persuasive on what the law is in the United States.

In *Federal Crop Ins. Corp.* v. *Merrill,* 332 U. S. 380, this Court noted that (at p. 383):

> "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures."

Civil law cases "holding foreign states subject to their jurisdiction whenever the foreign states are acting, as it is phrased, not in sovereign or political capacity (*jure imperii*) but as subjects of civil rights (*jure gestionis*)", were noted by Judge Mack in *The Pesaro,* 277 Fed. 473, 484, wherein he denied the claim of immunity because the Government vessel was engaged in commercial enterprise. This Court, however, reversed this decision (*Berizzi Bros.* v. *SS. Pesaro,* 271 U. S. 562), thereby rejecting the restrictive theory. This view was affirmed in *Compania Espanola* v. *The Navemar,* 303 U. S. 68, 74.

The doctrine of sovereign immunity is too deeply embedded in our law to be uprooted by judicial decision. This seems particularly appropriate in the instant suit, which is based upon specific legislation (Section 25-b of the Federal Reserve Act), the benefits of which Congress could, but did not, condition upon the sovereign's waiver of immunity. If the doctrine is to be modified, any change in the substantive law permitting territorial jurisdiction to be exercised even to a limited degree should be made by Congress[38] through an express legislative pronouncement, or by

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[38] *Cf: Halycon Lines* v. *Haenn Ship Corp.,* 342 U. S. 283, 285; *U. S.* v. *Atlantic Mut. Ins. Co.,* 343 U. S. 236, 242.

treaty.[39] Certainly the lack of unanimity among nations as to the restrictive theory seems to compel such a course. As Mr. Tate's letter indicates, there are at least sixteen countries, including the United States and the British Commonwealth, that have not applied the restrictive theory, as opposed to possibly eleven civil law countries that have followed it. Furthermore, because of the lack of reliance in civil law countries upon *stare decisis*, their decisions can not be cited for binding precedents. That the problem is one for multilateral convention or treaties is recognized by the State Department.[40] Indeed, it appears that the State Department, where it has sought to exclude sovereign immunity from commercial activities, has done so by treaty. However, there is no treaty with respondent waiving its sovereign immunity.

Moreover, international comity requires that foreign governments be notified of any modification of immunity in a manner not to be misunderstood. Mr. Chief Justice Marshall, in *The Schooner Exchange* v. *McFadden*, 7 Cranch 116, 146 (quoted with approval in *Berizzi Bros.* v. *SS. Pesaro*, 271 U. S. 562, 564) took care to point out that "Without doubt, the sovereign of the place is capable of destroying this implication, * * * But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary

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[39] The Maipo, 259 Fed. 367, 368 (per Judge Hough).

[40] See p. 2 of foreword to State Department's treatise on "The Law of Sovereign Immunity" (referred to *supra*, f. n. 9) where it is said: "In view of the fundamental differences in basic concepts suggested above, it is important to give careful attention to the possibility of resolving the whole matter by multilateral convention * * *"; also p. 13 of that portion of the treatise dealing with Common Law Countries. Cf. Brandon, The Case Against the Restrictive Theory of Sovereign Immunity (1954), 21 Insurance Counsel Journal, 11 at p. 15.

tribunals a jurisdiction, which it would be a breach of faith to exercise." It is submitted that this can be accomplished only by treaty.

The Counterclaims Relate to Public Funds and Therefore Are *Jure Imperii* Within the Restrictive Theory.

Both counterclaims embrace Treasury notes which relate to the fiscal operations of a sovereign. The counterclaims, therefore, deal with governmental or public acts, so that even within the restrictive theory respondent may plead immunity. Like its currency, Treasury notes and bonds are issued by virtue of the sovereign power. Interruption in payments thereof occur solely by virtue of the sovereign authority of the state, an act *jure imperii*.

Courts in this country and also in England have consistently held that debts due from a foreign nation in the nature of bonds cannot be enforced in the creditor nation. *Bank of Washington* v. *State of Ark.*, 20 How. 530; *Monaco* v. *Mississippi*, 292 U. S. 313; *U. S.* v. *Securities Corp. General*, 4 F.(2) 619, at p. 622, affirmed 269 U. S. 283. In *Twycross* v. *Dreyfus* (1887), 36 Law Times Report 752 the Court of Appeals remarked at page 755:

> "The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign country, or even by the ordinary tribunals of the country which issued them, without the consent of the government of that country. That being so, it appears to me that the bond in question confers no right of action on the plaintiffs, and on that ground it follows that the demurrer ought to be allowed. * * *"

And in *Hannes* v. *Kingdom of Roumania M. Institute*, 169 Misc. (N. Y.) 544 at p. 545:

> "Particularly universal is the rule obtaining in international law that when a question of the public debt of a sovereign nation is involved, the shield of immunity from suit in the courts of a foreign nation is impenetrable."

Furthermore, the treaties which the State Department has concluded with foreign countries (Petitioner's brief, pp. 44-45) do not embrace fiscal operations of a sovereign such as are here involved, but the treaties apply merely to "* * * business activities within the territories of the other Party * * *".

The Harvard Draft Convention in Article 11 accepts the restrictive theory of immunity. The comment to the Article (Am. J. Intern. Law Supp. (1932) at p. 609) recognizes that, even if the principle is accepted, "it is difficult to set up a standard for distinguishing between the two classes of acts", that in which the state acts either jure imperii or jure gestionis. However, special precaution was taken with respect to one type of activity, viz., public funds. Article 11 concludes with a specific paragraph "The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt", and the comment to the Article defines "public debt" explicitly to include Treasury notes of a sovereign.

CONCLUSION.

That one cannot litigate a claim against a sovereign does not mean he is foreclosed from collecting on a valid claim, but only that he must resort to diplomatic channels. Surely petitioner when dealing with foreign governments recognizes and considers these calculated risks which are

not present in ordinary business transactions between individuals. "* * * when one knows with whom he is dealing and the law applicable, he must arrange accordingly". *The Maipo*, 252 Fed. 627, 630.

Petitioner must rely on the good faith and honor of respondent. For almost twenty years the National Government of China has been through one national crisis after another, and it has been compelled to fight and is still fighting for its very existence. But at no time has respondent repudiated any of its just obligations.

It would be an unfortunate rule that would allow a bank to set off Treasury notes against funds of a sovereign deposited with the bank. Financial distress of an obligor usually results in his obligations being sold at discount. Banks able to buy government notes on the open market at prices below their face value would have an opportunity to convert the government deposit into a substantial profit. But more important, when dealing with a sovereign in times of crisis a bank knows that a deposit when opened is for the specific purpose of having funds available to meet the sovereign's current emergency needs.

The United States, by waiving its immunity from suits on certain transactions, may set an example for other nations to follow voluntarily. But certainly for the United States to force its concepts on other countries would be inconsistent with its own democratic principles. Thus, it is one thing for Congress to enact a statute waiving the immunity of the United States from set-offs unrelated to the main suit; it is another thing for this Court to hold that foreign countries suing in United States courts must meet the standard Congress has prescribed for the United States. Moreover Congress, when it enacted Section 25-b of the Federal Reserve Act, could have conditioned its benefits on compliance by the foreign sovereign with the

standards Congress had prescribed for the United States, but it did not do so.

It is significant that the Harvard Draft Convention, which resulted from a careful study by eminent scholars on international law, reached conclusions contrary to petitioner's main contentions: indirect counterclaims including set-offs are not pleadable against a sovereign plaintiff unless independent proceedings thereon against the sovereign can be maintained (Article 6); the rules of procedure of the forum cannot vary that principle (Article 14), and a sovereign cannot be made to litigate, whether by direct suit, indirect counterclaim or set-off, matters relating to its public debt. (Article 11).

In addition to the well-established reasons for sovereign immunity set forth in *U. S.* v. *Shaw,* 309 U. S. 495, 501, one of the most persuasive reasons for the recognition of the doctrine in this case is that a sovereign, in order to exist, must have complete control over its fiscal affairs. It must be in a position to decide when and how its indebtedness is to be paid, particularly in times of national crisis. The sovereign immunity that flows from this necessity and protects the government is as essential to the modern republic as it was to the ancient monarch. While a sovereign may waive this protection so far as suits against itself are concerned, or it may be removed by treaty or by international agreement, the right is too important and too well recognized to be destroyed or modified by the judiciary.

Assuming that the question is properly before the Court, and stripped of all but the essential, the controlling issue really is whether the National Government of the Republic of China has consented to be sued for a part of its national indebtedness. We submit that it has not, and that petitioner must resort to the normal channels of international negotiation for the payment of its claims.

The writ of certiorari should be dismissed as improvidently granted, or in the alternative the order of the Court of Appeals should be affirmed.

Respectfully submitted,

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October 6, 1954.

APPENDIX.

The third and last paragraphs of Section 632 of Title 12, U. S. Code, popularly known as Section 25(b) of the Federal Reserve Act, read as follows:

"§ 632. JURISDICTION OF UNITED STATES COURTS; DISPOSITION BY BANKS OF FOREIGN OWNED PROPERTY.

"* * *

"* * *

"Whenever (1) any insured bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to such insured bank, the payment, transfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property. Any suit or other legal proceeding against any insured bank or any officer, director, or employee thereof, arising out of the receipt, possession, or disposition of any such property shall be deemed to arise under the laws of the United States and the district courts of the United States shall have exclusive jurisdiction thereof, regardless of the amount involved; and any such bank or any officer, director, or employee thereof which is a defendant in any such suit may, at any time before trial thereof, remove such suit from a

State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

"* * *

"For the purposes of this section, (1) the term "property" includes gold, silver, currency, credits, deposits, securities, choses in action, and any other form of property, the proceeds thereof, and any right, title, or interest therein; (2) the term "foreign state" includes any foreign government or any department, district, province, county, possession, or other similar governmental organization or subdivision of a foreign government, and any agency or instrumentality of any such foreign government or of any such organization or subdivision; (3) the term "central bank" includes any foreign bank or banker authorized to perform any one or more of the functions of a central bank; (4) the term "person" includes any individual, or any corporation, partnership, association, or other similar organization; and (5) the term "insured bank" shall have the meaning given to it in section 264 of this title. Dec. 23, 1913, c. 6, §25(b), as added June 16, 1933, c. 89, §15, 48 Stat. 184, and amended Apr. 7, 1941, c. 43, §2, 55 Stat. 131."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 30.

THE NATIONAL CITY BANK OF NEW YORK,

Petitioner,

v.

THE REPUBLIC OF CHINA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION OF RESPONDENT FOR REHEARING.

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PETITION OF RESPONDENT FOR REHEARING.

Respondent, the National Government of The Republic of China, respectfully presents this, its petition for rehearing in the above entitled cause, and in support thereof presents the following:

INTRODUCTION.

Respondent is a plaintiff in this suit brought in the United States District Court, Southern District of New York against defendant The National City Bank of New York to recover a $200,000 deposit account. In its answer, defendant pleaded two counterclaims, based on allegedly

matured Treasury Notes of The Republic of China, amounting to $1,634,432. The dismissal on motion of the counterclaims by the District Court was unanimously affirmed by the Court of Appeals for the Second Circuit on the ground that the counterclaims were not based upon the subject matter of the main suit and, therefore, could not be litigated against the plea of sovereign immunity by The Republic of China (R. 64-72). Defendant's petition for certiorari was granted by order of this Court filed April 26, 1954 (R. 73). Thereafter, briefs having been filed by both parties, oral argument was heard by this Court on November 9, 1954. On March 7, 1955, this Court rendered a four to three decision reversing the judgment of the Court of Appeals and remanding the case to the District Court with directions to reinstate the counterclaims.

Mr. Justice Frankfurter wrote the majority opinion, joined by Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Minton; Mr. Justice Reed dissented, joined by Mr. Justice Burton and Mr. Justice Clark.

At the time of argument and at the time the decision was rendered there existed a vacancy on the Court. This vacancy has since been filled by Mr. Justice Harlan.

Mr. Justice Douglas, who participated in the consideration and decision on the application for certiorari and who heard the oral argument of the parties after certiorari was granted, took no part in the consideration or the decision of the case.

Grounds for Rehearing.

1. Although the Court agreed that the counterclaims, since they are connected with the sovereign's fiscal management, fall within the category of immune operations of a foreign government as defined by the State Department's

1952 pronouncement, yet it felt that this could not be considered because the State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with The Republic of China. While The Republic of China had heretofore considered it inappropriate to submit a note to the State Department, it has now been constrained, pursuant to the Court's suggestion, to do so. Because of The Republic of China's grave concern that the allowance of the counterclaims will seriously jeopardize its financial transactions in the United States and embarrass the mutual interests of the respective governments, it has instructed its Ambassador to present a note to the State Department, which note has now been formally presented, wherein the position of The Republic of China is stated with the request that the State Department transmit it through regular channels to this Honorable Court, together with such suggestion thereon as the State Department may deem it appropriate to make.

2. The decision of the Court, if allowed to stand, will adversely affect not only the normal and necessary financial dealings of The Republic of China in the United States, but also those of all other nations who will find themselves faced with the dilemma of having transferred funds to or established credits in this country for specific governmental purposes, the payment of which, contrary to all previous decisions on the subject, can now be avoided by the offsetting of governmental obligations acquired at par or at a substantial discount. The Chinese accounts in this country which will be adversely affected by this decision are large and varied. It will affect not only direct accounts of The Republic of China, but also all accounts of its representatives and agencies, including such accounts as branches of the armed

forces, procurement missions, governmental departments and bureaus. It follows that the decision of the Court will seriously hamper the National Government of The Republic of China in the ordinary course of its governmental operations and will serve to frustrate the established policy of the United States to accord economic and other aid to the National Government of The Republic of China. The decision will also act as a deterrent to foreign countries from opening credits in the United States, which can now be vitiated by offsetting bonds or other obligations of the foreign country purchased at par or at substantial discounts. It is respectfully submitted that the decision of the Court should be reappraised in the light of these sweeping consequences.

3. Since the decision sanctions the allowance of a suit by counterclaim against a sovereign in courts outside of its own territorial limits, it opens the door to foreign courts holding the United States subject to counterclaims even on sovereign obligations, *jure imperii* in form. The decision thus contravenes the clear intention of the Congress of the United States (28 U. S. C. §2406) that the United States be subject to counterclaims or set-offs only in United States Courts and only after required administrative procedure in the General Accounting Office has been complied with.

4. The majority opinion, in arriving at the conclusion that a foreign sovereign is suable by counterclaim in the United States, relies upon a "steady legislative trend" of United States statutes, and cases interpreting those statutes, by which the United States has affirmatively consented to suit in the United States. But the point here involved is the suability of a sovereign outside of its own territory. There is no legislative trend by which the United

States has consented to suit, either directly or by counterclaim, outside of its territorial confines; nor is there any legislation even intimating that a foreign sovereign should be subjected to suit, either directly or by counterclaim, outside of its territorial confines and in the United States. The only legislative trend dealing with a foreign sovereign's immunity is found in 22 U. S. C. §288a (b). This statute enacted in 1945 nowise limits the concept of foreign sovereign immunity, but rather accepts it and expands it so as to apply to international organizations. The statute provides: "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."

5. The Court bases its decision upon Chinese internal law which is stated as permitting suits against the Chinese Government in its own courts on contract claims, including Treasury Notes such as are the subject of the counterclaims. We respectfully submit that the Chinese law is not correctly stated in the opinion. It is true that under Chinese law relief may be obtained against the Chinese Government in certain circumstances by one deemed aggrieved as a result of governmental action However, since such grievances are based on public law and not civil law, they cannot be pursued, whether by a Chinese citizen or an American citizen, in the ordinary civil courts of China. Rather, the internal Chinese law governing administrative claims applies. This requires that a petition for relief be filed with the cognizant governmental agency, following prescribed procedure and within a

definite time limitation. If the claim is denied, an administrative appeal must be filed and rejected before it can be entertained by a special administrative court organized for that purpose. Judicial Yuan Interpretation No. 373, relied upon by the Court, was promulgated as a supplement to Judicial Yuan Interpretation No. 107; these two interpretations establish that in cases not involving ordinary contract claims, but relating to the sphere of governmental activities, no one can sue the Chinese Government in its ordinary civil courts. The Treasury Notes which form the basis of the counterclaims clearly are within the sphere of governmental activities, and The Republic of China is not suable thereon in its ordinary civil courts; the noteholder must pursue the prescribed administrative process. Thus, while defendant may be entitled to special relief under Chinese law and consequently no irresponsible situation is created by allowing in this case the plea of sovereign immunity, yet the position and rights of the defendant should not be better than the position and rights of Chinese citizens in Chinese courts.* A contrary view would result in circumventing the prescribed Chinese law controlling governmental claims and would result in nullifying the requirement making the right to resort to its special administrative court dependent upon compliance with the conditions precedent prescribed by its law. Just as defendant could not have instituted a suit or filed its counterclaims against the Chinese Government in a Chinese civil court, so it should not be able to institute suit or file its counterclaims against the Chinese Government in a corresponding American court.

6. Both the majority and minority opinions recognize the fundamental importance of the question of international

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* Treaty of Nov. 4, 1946, Art. VI, §4, 63 Stat. 1305.

law which the case presents. Although it had never before been directly passed upon by this Court, it has been considered in numerous decisions of lower federal courts and in England (see footnote 6 of the majority opinion and footnotes 6 and 7 of the dissenting opinion), but none have reached the result taken by the Court in this case. Whereas ordinarily a decision by only four members of the Court would not result in reversing a judgment of a Court of Appeals, yet in the instant case, because of the vacancy which had existed and because of Mr. Justice Douglas not taking part in the consideration of the case, the decision by four members of the Court has resulted not only in the reversal of the judgment of the Court of Appeals, but also in the overturning of what has been considered a well-settled principle limiting counterclaims against a sovereign to those based on the subject matter of the main suit. The vacancy, however, has since been filled and the granting of rehearing will enable Mr. Justice Harlan to take part in the decision. It may also be that on rehearing Mr. Justice Douglas will take part in the decision. While, of course, it is recognized that a four to three decision until overruled is binding as a decision of the Court, yet it must be considered that since the decision has not been concurred in by a majority of the full Court, it is open to future repudiation by those Justices who did not take part joining with the present minority*; and it is probable, until a majority of the full Court has expressed itself on the question, that it will sooner or later come again before the Court

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* *Cf. Hust* v. *Moore-McCormack Line*, 328 U. S. 707, a four to three decision in which Chief Justice Vinson and Mr. Justice Jackson did not participate, although several years later they combined with the dissenters and overruled the decision in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783. See also the concurring opinion of Mr. Justice Frankfurter in *Kovacs* v. *Cooper*, 336 U. S. 77, 89, rejecting "a single decision by a closely divided court" although decided just a few months prior thereto.

for its further consideration. It is respectfully submitted that a question of such international importance as is here involved should not be finally decided contrary to all prior precedent by less than a majority of a full Court, particularly where the full Court as it is now constituted has not had occasion to take part in the consideration and decision of the case.

WHEREFORE, it is respectfully prayed that the petition for a rehearing be granted and that the judgment of the Court of Appeals for the Second Circuit be, upon further consideration, affirmed or, in the alternative, that a reasonable time be granted to file a supplemental petition for rehearing pending the transmittal to this Honorable Court by the State Department of such suggestion as it may deem appropriate.

Respectfully submitted,

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KIRLIN, CAMPBELL & KEATING,
Of Counsel.

March 31, 1955.

I, Louis J. Gusmano, counsel for the above-named respondent, do hereby certify that the foregoing petition for the rehearing of this cause is presented in good faith and not for delay.

Louis J. Gusmano,
Counsel for Respondent.